JUN 25 1957
JOHN T. FEY, Clerk

No. [redacted]24

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24,370

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC.,
Defendant-Appellant

v.

GENERAL ELECTRIC COMPANY, *Plaintiff-Appellee*

On Appeal from the United States District Court for the Southern District of New York

APPELLANT'S APPENDIX

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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GENERAL ELECTRIC COMPANY, *Plaintiff*,

v.

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC., *Defendant*.

APPELLANT'S APPENDIX

Statement Required by Rule 15(b) of the Rules of This Court

The title of this case and the respective parties are named above. The original attorneys appeared at the trial of the case.

The complaint was filed in the United States District Court for the Southern District of New York on May 28, 1954. Issue was joined by the service of answer on August 31, 1954. The case was tried before the Honorable Alexander Bicks, sitting without a jury, on March 22, 1955. All of the evidence was submitted in the form of a stipulation between the parties.

Judge Bicks filed his opinion, incorporating findings of facts and conclusions of law, on October 3, 1956. A final judgment was entered on October 24, 1956, granting part of the injunctive relief prayed for by plaintiff, insofar as it sought an injunction with respect to transactions by the defendant with residents of New York and denying the same insofar as an injunction was sought as to transactions between the defendant and residents of other states. On October 28, 1956 defendant filed its notice of appeal. The record was certified to this Court on October 29, 1956.

Judgment of the Trial Court

Plaintiff herein having commenced this action for an injunction permanently restraining the defendant from advertising, offering for sale and selling at retail, certain appliances manufactured and sold by plaintiff and bearing plaintiff's trademark, "General (GE) Electric", which are the subject of fair trade agreements entered into by plaintiff and various retailers in New York, New Jersey and all other States having similar fair trade laws; and this cause having come on for further and final hearing; and the issues having been tried before the Court without a jury and the evidence of all the parties hereto having been heard; and the Court having rendered its opinion (constituting its findings of fact and conclusions of law) filed herein October 3, 1956, in which it was found that defendant had advertised, offered for sale and sold the aforesaid appliances in the State of New York at prices below the minimum retail resale prices stipulated therefor by plaintiff in accord with agreements entered into pursuant to the Feld-Crawford Act between plaintiff and various retail dealers throughout the State of New York; and the Court having found that plaintiff failed to prove that defendant is making resales of the aforesaid appliances in the States of New Jersey, West Virginia, Virginia, Pennsylvania, Ohio, Massachusetts, Delaware, Connecticut and Maryland;

Now, therefore, it is

ORDERED, ADJUDGED AND DECREED that the defendant, its successors and assigns, their officers, agents, employees and all persons acting under their authority or control and each of them be, and they hereby are, permanently enjoined and restrained from advertising, offering for sale or selling at retail in the State of New York, portable appliances, radios, clocks, automatic blankets, fans, heaters, heating pads and vacuum cleaners, manufactured and sold by plaintiff and bearing plaintiff's trademark "General (GE) Electric" at prices below the minimum retail resale prices established by the plaintiff therefor from time to time in accord with agreements entered into pursuant to the Feld-Crawford Act between plaintiff and various retail dealers throughout the State of New York which agreements at the time of the filing of the complaint herein were, now are or may hereafter be in force in the State of New York relating to the sale or resale of any of the aforesaid General Electric products in that State; and it is further

ORDERED, ADJUDGED AND DEGREED that plaintiff's prayer for an injunction restraining the defendant from advertising, offering for sale or selling the aforesaid General Electric products at prices below the aforesaid minimum retail resale prices stipulated in accord with fair trade agreements entered into between the plaintiff and various retailers in the States of New Jersey, West Virginia, Virginia, Pennsylvania, Ohio, Massachusetts, Delaware, Connecticut and Maryland pursuant to fair trade laws in force in those States be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED AND DECREED that jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further and other orders and decrees, or taking such

further action, if any, as may become necessary or appropriate to carry out and enforce this judgment.

Service of a copy of this judgment on defendant's counsel shall be deemed good and sufficient notice to defendant.

/s/ Alexander Bicks
Alexander Bicks,
U.S. District Judge.

Dated: October 24, 1956.

Opinion of the Trial Court, Including Findings of Fact and Conclusions of Law

Bicks, D. J.

Plaintiff, General Electric Company, a New York corporation, here seeks an injunction against Masters Mail Order Company of Washington, D.C., Inc., a Maryland corporation.[1] To support its claim, G. E. argues that Masters advertises, offers for sale, sells and delivers G. E. appliances, for example, in New York below resale prices fixed by G. E. in contracts with other New York retailers pursuant to New York's Feld-Crawford Act.[2] As a result, G. E. claims Masters has damaged G. E.'s "lawful distribution system and the maintenance of its retail fair trade program in New York," and other states with like fair trade laws.

In reply, Masters urges principally that Feld-Crawford, along with similar state "fair-trade" laws, do not proscribe its conduct in "fair-trade" states. Were state "fair-trade" construed to cover Masters' sales, defendant goes on, such state laws would impose an undue burden on interstate commerce and must, under the Supremacy Clause, fall by reason of the Sherman Act.[3]

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[1] The demand for a money judgment was withdrawn at trial.

[2] N.Y. Gen. Bus. Law, 369-a et seq.

[3] 15 U.S.C. §§ 1-7.

To these issues I now turn.

Feld-Crawford, in relevant part, makes "actionable" at the suit of any "person damaged thereby * * * advertising, offering for sale, or selling any commodity" below resale prices fixed in accord with Feld-Crawford's terms. Do Masters' activities, then, come within Feld-Crawford's ban?

Since the enactment of the McGuire Act,[4] the parties here stipulate, "G. E. has entered into over 12,000 written fair trade agreements with retailers, including over 1,200 in New York and New Jersey alone." G. E.'s contracts, Masters also agrees, cover only appliances "in fair and open competition * * * with appliances of the same general class produced by others." And the parties stipulate, "G. E. has systematically and repeatedly given notice" of "fair-trade" agreements as well as "diligently and vigorously enforced" their terms. As part of this enforcement plan, "G. E., since July 14, 1952, has instituted in excess of 834 * * * [court] actions * * * including 410 in New York and New Jersey."

One of these enforcement suits, brought in New York in late 1952, was against Masters Inc., a New York retailer. In that action, Masters (New York) was enjoined from violating G. E.'s fair-trade agreements. For flaunting that state court injunction, Masters (New York) was fined twice in early 1953. A few months later, Masters (New York) organized defendant here, Masters (Maryland). Masters (New York) owned all Masters' (Maryland) stock. The same man served as President of both companies. About a year later, but after suit here, the parties stipulated that "defendant was dissolved as a Maryland corporation." And since then, its "business * * * has been carried on by a corporation bearing the same name but organized under the laws of the District of Columbia * * *"

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[4] 15 U.S.C. § 45.

Soon after these corporate convolutions, Masters itself emblazoned its purpose in advertisements scattered throughout New York:

> It's Becoming A Crime To Offer Bargains.
> Masters recently paid * * * a penalty of $1750 to G. E. for cutting fixed prices * * * Masters had continued to give its customers bargains despite court orders so that the discount house was found guilty and had to pay the penalty.
>
> Masters Mail Order Company of Washington, D.C. Inc. has been established in Washington, D.C. because it is a non fair trade area. This means we are permitted from Washington, D.C. to offer you anywhere in the country sensational discounts on famous brands.

To insure its goal of frustrating Feld-Crawford, Masters (New York) dictated the every move of Masters (Maryland). Thus, according to the parties' stipulation, the "President, Vice President, Secretary" and "Treasurer" of Masters' (Maryland) were "all * * * officers, employees, directors or agents of" Masters (New York). These officers of Masters (Maryland), the parties further agree, continued to occupy the very New York office space "occupied by them as officers, directors, employees or agents of" Masters (New York). Masters' (Maryland) "books and records", its "cash receipts and cash disbursements, general ledger, unpaid bills file" and "duplicate sales tickets" were kept at offices of Masters (New York). A "daily report" of defendant Masters' receipts, cash disbursements and shipments" was sent on to Masters (New York). Indeed, "the only person authorized to sign checks on "defendant's behalf" was the very individual who served as principal officer of Masters (New York). It was he who, defendant agrees, "supervised defendant's business by regular daily telephone calls * * * by mail," and by visits to Washington. From all this an unblurred picture emerges: Though

puppet Masters (Maryland) held the Washington stage, its strings were pulled by Masters (New York).

It is against this background of defendant's birth and life as a convenient creature of Masters (New York) that defendant's activities take on their true meaning. Building again on stipulated facts, "Defendant's President," the top official of Masters (New York), "had supervision and control of the preparation and publication" of defendant's "mailing piece[s]." This "supervision and preparation," moreover, "was principally carried out" in offices of Masters (New York). These "mailing piece[s]" typically proclaimed that "Masters recently paid * * * a penalty * * * to G. E. for cutting fixed prices"; that "Masters Mail Order Company * * * has been established in Washington, D.C., because it is a non fair trade area"; that "[t]his means *we* are permitted from Washington, D.C. to offer you anywhere in the country sensational discounts on famous brands"; and that, to exploit this opportunity, recipients should "use the handy order form." [Underscoring added.] Some "325,000 copies" of this circular were "printed" in New York, "delivered to Masters" (New York), and "addressed" "at the request of" Masters' (New York) officials, with "Addressograph plates owned by Masters" (New York), to "persons on the mailing list of Masters (New York)." With "postage charges" paid initially by Masters (New York), these circulars "were shipped by truck to Washington, D.C., and from there were mailed to prospective customers in New York, New Jersey, and other fair trade States."

Again, the parties have stipulated that "preparation" of the "order blanks" was "supervised," and "controlled" and paid for in New York by officials of Masters (New York). Some copies "were sent to defendant * * * in Washington, D.C." Others "were retained by Masters (New York)" and "kept * * * behind the appliance

counter at its place of business in New York City * * *." These copies "were distributed by" Masters (New York) "employees * * * at its New York store to persons who sought to buy G. E. appliances at less than fair trade prices or who asked for order blanks for "your Washington store." Moreover, the stipulation goes on, Masters' employees were instructed to inform such persons that if they so desired they could obtain GE fair traded appliances at less than fair trade prices from defendant by mail orders sent to the District of Columbia." Following up such inquiries from Masters' (New York) customers who sought "GE appliances at less than the fair trade price," Masters (New York) wrote each a letter "accompanied by copies of * * * [Masters' (D.C.)] mail order form with the mail order patron typed in by an employee of Masters (N.Y.)." Finally, "In at least one instance, an employee of Masters of New York wrote in the name of a prospective New York purchaser on an order blank and mailed it to the purchaser to be filled in, signed and forwarded to Masters of Washington."[5]

Masters' (Maryland) "order blanks" then were passed out over the counter in Masters' (New York) store. Further, Masters' (Maryland) advertising letters were posted in New York to Masters' (New York) New York customers directing them to Masters (Maryland). This much, standing alone, would suffice to make up "advertising" within Feld-Crawford.

But Masters (Maryland) did more. Posting some 300,000 copies of its "mailing piece," prepared in New York, printed in New York, addressed in New York to "persons on the mailing list of Masters (New York)" also consti-

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[5] *General Electric Co.* v. *Masters Mail Order Co.*, 122 F. Supp. 797, 799-800 (S.D.N.Y. 1954). Masters (New York) connection with defendant's operations are indeed so close that this Court, in an analogous proceeding involving principally defendant Masters' operations, felt that a "searching inquiry" was required to determine whether Masters (New York) was in contempt of its New York injunction. See *Sunbeam Corp.* v. *Masters Inc.*, 124 F. Supp. 155, 160 (S.D.N.Y. 1954).

tutes "advertising". Feld-Crawford cannot be dodged by the "gimmick" of posting in Washington. No more than if a company's nearest post office was across a state line, or if an "ad", posted in New York and addressed to a customer in New York chanced as a matter of postal convenience to traverse another state, can defendant's Washington mailing circumvent Feld-Crawford. Defendant's "object," as one court reasoned in an analogous case, "could not be attained except by delivery of the matter to prospective customers * * * [T]his end could as well be reached by use of the mails as by the physical presence of the absent dealer in the state." [6] Clearly, Masters' (Maryland) activities constitute "advertising" in New York within Feld-Crawford.

Defendant's activities, in like fashion, fall within Feld-Crawford's ban on "offering for sale, or selling" in New York below "fair trade" prices. Indeed, defendant's "ad" concededly mailed to New Yorkers, proclaims, "We * * * *offer* you * * * SENSATIONAL DISCOUNTS ON FAMOUS BRANDS." Corroborating this ad's design as an offer, Masters (New York) advised would-be purchasers of G. E. appliances: "Thank you for your recent mail order * * *. A court injunction obtained against us * * * prevents us from selling this merchandise to you at below the Fair Traded List Price * * * Masters Mail Order Company of Washington, D.C., Inc., *offers* the merchandise you ordered at a substantial discount." [7] [Underscoring added.] All that was left for the New York customer to do was insert his name, address and specify the appliance desired on the accompanying order form. A New Yorker's mailing this order form here converted defendant's offer to a contract to sell.[8]

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[6] *State* v. *Davis*, 87 S.E. 262, 265 (W. Va. 1915); see *United States* v. *Thayer*, 209 U.S. 39, 43 (1908).

[7] Rec., Ex.'s E, F.

[8] Restatement of Contracts, § 25, (3).

True, defendant's mail order forms state "This order is subject to acceptance by Masters Mail Order Company, Inc., in Washington, D.C." Equally true, however, there is no evidence this caveat has any semblance of a business meaning: The record reveals not one instance where defendant in fact did not accept a customer's offer or even questioned his credit.[9] In this context, then, as the Supreme Court put it, "acceptance was a mere formality since one hardly incurs the cost of soliciting orders to reject."[10]

Responding to these orders, defendant's mailing of appliances to New Yorkers constituted "selling" in New York. At the outset, title passed here. Thus, Uniform Sales Act Section 19 specifies that "[i]f the contract to sell requires the seller to deliver the goods to the buyer * * * or to pay the freight or cost of transportation to the buyer * * * the property does not pass until the goods have been delivered to the buyer * * *".[11] Defendant's practice, of course, is "to deliver the goods to the buyer in New York. On these New York deliveries defendant did not charge or collect the District of Columbia sales tax.[12] Its mail order forms, moreover, explain, "It is understood that there is no charge for shipping". In accord with settled law, then, title passed in New York.

More important than such divinations as to title's passage, Feld-Crawford's design can best be gauged in terms of the mischief it sought to remedy. Feld-Crawford's prime aim, as the New York Court of Appeals expressed it, "'is to protect the property—namely, the good will—of the producer, which he still owns. * * *,

Old Heurlorn Distributing Co. v. *Seagram Distillers*

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[9] *Cf.* 1 Corbin, Contracts § 33 (1950).

[10] *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 346 (1954).

[11] New York Personal Property Law § 100.

[12] D.C. Tax Regl. § 401 (14), 1 D.C. Register 9 (July 19, 1954), P-H D.C. Tax Serv. Par. 31, 540.60.

Corp., 229 U.S. 183, 193)."[13] That Act, the New York high court went on, "was manifestly aimed and designed to protect the good will of the owner or producer from injury when his trade-mark or name is employed in the resale of goods originally owned or produced by him * * * It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition'."[14] Applying that policy, the New York Court of Appeals has "squarely held that the statute applies to nonsignatories in interstate commerce;"[15] and specifically to out-of-state mail-order sales by a New York retailer.[16] The New York Court of Appeals, then, has proclaimed Feld-Crawford's design, and their construction binds this Court.[17]

It is that design which defendant's actions blatantly thwart. Originally, to repeat, Masters (New York) sold the very appliances at the same below fair trade prices to the very New Yorkers to whom defendant now sells. When the New York State Court enjoined Masters (New York), defendant Masters took over. Under the close rein of Masters (New York), defendant advertised, not in newspapers or magazines that reached New Yorkers, among others, but instead over the counter of Masters (New York) or via direct mailings prepared in New York by its New York parent and directed expressly to New Yorkers. Moreover, "part" of the very appliances

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[13] *Guerlain, Inc. v. Woolworth Co.*, 297 N.Y. 11, 17 (1947). See also *Bristol-Meyers Company* v. *Fisher*, 302 N.Y. 61 (1950); *Port Chester Wine & Liquor Shop* v. *Miller Bros.*, 281 N.Y. 101 (1939).

[14] *Guerlain* v. *Woolworth*, *supra*, at 18.

[15] *General Electric Co.* v. *Masters, Inc.*, 307 N.Y. 229, 241 (1954).

[16] *Razor Corp.* v. *Goody*, 121 N.Y.S. (2d) 882, affirmed 307 N.Y. 229, 240 (1954).

[17] *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

sent New Yorkers, defendant stipulates, had "been acquired from Masters (New York)" and shipped to Washington with an eye toward resale back to New Yorkers. Thus, though the form was altered, the substance was not. It was still in New York that defendant's goods were advertised, sold and delivered. It was in New York, moreover, that the effect of the very impact New York's Legislature proscribed was intended and felt. For Feld-Crawford to be anything short of a dead letter, defendant's activities must be held within its terms.

Feld-Crawford, so construed, finds sanction in the McGuire Act. McGuire seeks, in the language of its preamble, "to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce." [18]

Implementing that purpose, McGuire paragraph (a) (3) exempts from antitrust interdiction the exercise of any right of action "created by * * * any State [against] wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price or prices prescribed in such contract or agreements * * *" And, McGuire paragraph 4 specifies exercise of such rights of action shall not "constitute an unlawful burden or restraint upon, or interfere with, commerce."

Paragraph 4's "purpose", the House Committee Report explained, "is to remove any obstacle, as far as

[18] 66 Stat. 631-632 (1952).

Federal Law is concerned, which might stand in the way of a broader interpretation of State fair-trade laws so as *to make them applicable to retail transactions and retail advertising which cross state lines.*"[19] (Emphasis added) To insure this goal, the House Committee modified the McGuire Bill. McGuire, as introduced, specified fair trade contracts might apply "'* * *' to persons *within the State* even though such persons are not parties thereto.' " (Emphasis supplied). Stricken by the House Committee, however, were the words "within the state." Thus, McGuire as reported out by the House Committee provided simply that fair trade contracts might bind "persons who are not parties thereto." And, settling the intent of the House, the House rejected a proposal to bar any cause of action with respect to interstate movements of commodities into or out of non-fair trade territory.[20] Finally, construing McGuire's language on the floor of the Senate, Senator Humphrey explained[21] "The bill will have this effect. It will require that where there are trade or branded names on which fair-trade prices have been established the mail-order house will sell them at those prices in any State, just as the local retail man is required to do."

Against this background, too clear for a challenge is that McGuire, as a learned brother has put it, was designed "to open all interstate commerce to the operation of state and fair trade actions * * * "[22] (sic) It is now settled law that a state may validly enforce its fair trade laws against a non-signing local vendee who sells into another

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[19] H.R. Rep. No. 1437, 82d Cong., 2d Sess. 2 (1952).

[20] 98 Cong. Rec. 4946. See also H.R. Rep. 1516, 82d Cong., 2d Sess. 17 (1952).

[21] 98 Cong. Rec. 8887.

[22] *Sunbeam Corporation* v. *Masters, Inc.*, 124 F. Supp. 155, 158 (S.D.N.Y. 1954). See also, *Sunbeam Corporation* v. *McMillan*, D.C., 110 F. Supp. 836 (D. Md. 1953).

state.[23] Though defendant here is located in a non-fair trade jurisdiction, its contacts with New York permeate its every operation and, viewed as a whole, compel the conclusion that defendant has made New York "resales" within McGuire.

It is the very pervasiveness of defendant's New York operations that distinguish this case from *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, 140 F. Supp. 165 (D. Md. 1956) and *Revere Camera Co.* v. *Masters Mail Order Co.*, 128 F. Supp. 457 (D. Md. 1955). In *Bissell*, for example, the court concluded "sales are not made in Maryland by defendant," (140 F. Supp. 165, 172) and apparently viewed Masters' activities as involving no more than "advertising, offering for sale and selling in the District of Columbia" (*Id.* at 174). Similarly, the Revere court deemed Masters' "mail order business conducted from the District of Columbia" (128 F. Supp. 457, 462). Neither decision rests on detailed factual analysis of defendant's operations within Maryland. Such analysis of the proof of defendant's activities in and contacts with New York is so significant as to make inevitable the conclusion that defendant falls within Feld-Crawford.

In like fashion, the multitude of defendant's New York contacts obviates the necessity for entering the morass of legislative history surrounding rejection of the so-called Cole Amendment to McGuire (*Cf., Bissell Carpet Sweeper Co.* v. *Masters Mail Order Company*, 140 F. Supp. 165, 175-179). The case might be otherwise if the defendant had no connection with New York other than, for example, advertising in Washington or even New York newspapers and mailing merchandise requested in response to those ads.

Finally, defendant's dissolution after suit requires consideration of the propriety of awarding the injunctive

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[23] *Sunbeam Corporation* v. *McMillan*, 110 F. Supp. 836 (D. Md. 1953).

relief plaintiff seeks. Plaintiff's action was filed in September 1954. On October 18, 1954, however, the parties stipulated, defendant "was dissolved as a Maryland corporation. And since dissolution, their stipulation goes on, "the business of defendant, * * * has been carried on by a corporation bearing the same name but organized under the laws of the District of Columbia." The new corporation, defendant's transferee, uses the same name, assets, and below-fair-trade prices as defendant, and is wholly-owned, except for the qualifying shares, by the same stockholders that owned defendant. In short, only the bailiwicks have changed.

In *McComb* v. *Row River Lumber Co.*, 177 F. 2d 129 (9th Cir. 1949), the appellee argued much the same as does the defendant here. There the District Court denied an injunction and dismissed the complaint. During the pendency of the appeal, the successful party below dissolved and sold its assets to a successor corporation which continued the business. It then moved to dismiss the appeal, urging that having been dissolved it could not possibly continue the alleged conduct sought to be enjoined. Analogizing *Walling* v. *Reuter*, 321 U.S. 671 (1944), in which case an injunction below had issued, the court stated:

> The situation in the instant case seems to us to present an even stronger case [than *Walling* v. *Reuter*] for retaining the appeal and adjudicating the merits, because if we dismiss the appeal appellant cannot fall back on his lower court judgment and possibly enforce it against the successor corporation.

Maryland law expressly permits prosecution of any "pending suit or proceeding" against a dissolved corporation.[24] As in the *McComb* case, so here, dissolution of the corporate defendant *pendente lite* cannot be used to thwart plaintiff's equitable rights.

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[24] Flack's Ann. Code, Art. 23 § 78 (1951). See also, *Johnson-Battle Lumber Co.* v. *Emanuel Lumber Co.*, 126 S. W. 861 (Ga. 1925).

Plaintiff complains also of the defendant's activities in New Jersey, West Virginia, Virginia, Pennsylvania, Ohio, Massachusetts, Delaware, Connecticut and Maryland. Proof is lacking, however, that the defendant is making resales in any of the said states.

A decree for an injunction in accordance with this opinion may be submitted.

The foregoing shall constitute Findings of Fact and Conclusions of Law in accordance with Fed. R. Civ. P. 52 (a).

Dated: September 29, 1956.

Alexander Bicks,
U.S. District Judge.

208 **Stipulation of Documents and Facts Before the Trial Court**

Mr. Barton: Your Honor, the plaintiff and the defend- and have agreed to a stipulation of the facts in this case and there has been prepared a stipulation identifying the documents and agreeing on the facts in the case, and that stipulation is signed by both ~~parties.~~ And I should like now to read the stipulation into the record.

It Is Hereby Stipulated And Agreed by counsel for plaintiff and defendant, for the purposes of this action and for no other purpose, that the documents annexed hereto and described in Paragraph A are genuine and that the statements of fact contained in Paragraph B are true, as follows:

A. *Documents:*

1. Mailing piece addressed to Margaret J. Ralph, 242 Park Avenue, Lyndhurst, New Jersey, bearing the return address of Masters Mail Order Co. of Washington, D. C. Inc., 425 Seventh St., N.W., Washington, D. C., labeled "Is it a Crime to Give a Bargain?" annexed hereto as Exhibit A.

2. Mailing piece addressed to Mrs. E. G. Lowy, 125
209 Riverside Drive, New York 24, New York, bearing the return address of Masters Mail Order Co. of Washington, D. C. Inc., labeled "Is it a Crime to Give a Bargain?", annexed hereto as Exhibit B.

3. Mail order form directed to defendant, Masters Mail Order Co. of Washington, D.C. Inc., marked "J. C. Ludden. 6/4/54, Plaintiff's Exhibit 1 for identification;" annexed hereto as Exhibit C.

4. Mail order form directed to Masters Mail Order Co. of Washington, D. C., with the name "Andrew R. Cebulski, 93 Barnsdale Avenue, Buffalo 24, New York," typed in the blank labeled "Sold to." annexed hereto as Exhibit D.

5. Letter on the letterhead of Masters, Inc., addressed to Andrew R. Cebulski, marked as Plaintiff's Exhibit 5 for Identification, annexed hereto as Exhibit E.

6. Letter on the letterhead of Masters, Inc., addressed "Dear Patron" and reading in part: "Thank you for your recent mail order for:" annexed hereto as Exhibit F.

7. Catalog and mail order form addressed to
210 "Patron, Letter Carrier Route, Local" bearing the return address of the defendant, and marked "Plaintiff's Exhibit 3 for Identification," annexed hereto as Exhibit G.

8. Mailing piece addressed to "Patron, Letter Carrier Route, Local," bearing the return address of Masters, Inc., 66 West 48th Street, New York 36, New York, marked "Plaintiff's Exhibit 6 for Identification," and "Jane C. Ludden 6/4/54," annexed hereto as Exhibit H.

9. Photostatic copy of a mail order form issued by defendant, Masters Mail Order Company, Washington, D. C. Inc., dated April 5, 1954, bearing the name "Bernard M. Madon, 104-51 111th Street, Richmond Hill, New York," and directing the shipment, C.O.D., by the defendant of one General Electric steam iron, Model No. F-50, for the price of $14.21, annexed hereto as Exhibit I.

10. Duplicate original invoice bearing the name Masters Mail Order Company of Washington, D. C., covering one General Electric steam iron, Model No. F-50, shipped C.O.D. from Washington, D. C. to Bernard Madon, at the aforesaid address in New York, annexed hereto as Exhibit J.

211 11. Photostatic copy of a mail order form issued by defendant, Masters Mail Order Company of Washington, D. C., dated April 15, 1954, directing the shipment by defendant, C.O.D., of a General Electric iron, Model No. F-33, for $9.71, to Gladys Nicholson, 159 Lexing-

ton Avenue, New York, 16, New York, annexed hereto as Exhibit K.

12. Duplicate original invoice bearing the name of the defendant, Masters Mail Order Company of Washington, D. C., covering the shipment by defendant from Washington, D. C., C.O.D., of one General Electric iron, Model No. F-33, for $9.71, to Gladys Nicholson at the aforesaid address in New York, annexed hereto as Exhibit L.

13. Photostatic copy of a mail order form issued by defendant, Masters Mail Order Company of Washington, D. C. Inc., directing the shipment by defendant, C.O.D., of a General Electric toaster, Model No. T-82, for $17.96, to Barbara Joanne London, 27 West 84th Street, New York, New York, annexed hereto as Exhibit M.

14. Duplicate original invoice covering the shipment by defendant from Washington, D. C., C.O.D., of a
212 General Electric toaster, Model No. T-82, to Barbara London at the aforesaid address in New York, annexed hereto as Exhibit N.

15. Photostatic copy of mail order form issued by defendant, Masters Mail Order Company of Washington, D. C. Inc., dated April 19, 1954, directing the shipment by defendant, C.O.D., of a General Electric toaster, Model No. T-82, for $17.96, to Mary E. Burke, 154-03 58th Avenue, Flushing 55, New York, annexed hereto as Exhibit O.

16. Photostatic copy of a mail order form issued by defendant, Masters Mail Order Company of Washington, D. C. Inc., dated April 14, 1954, directing the shipment by defendant, C.O.D., of a General Electric portable mixer, Model No. M-10, for $14.95, to Henrietta Faerber, 36 East 28th Street, New York, New York, annexed hereto as Exhibit P.

17. Duplicate original invoice bearing the name Masters Mail Order Company of Washington, D. C., covering the shipment by defendant from Washington, D. C. C.O.D.,

of one General Electric portable mixer, Model No.
213 M-10, for $14.96, to Henrietta Faerber at the aforesaid address in New York, annexed hereto as Exhibit Q.

18. Photostatic copy of a letter signed by Natalie Quick, 68 Day Avenue, Tenafly, New Jersey, dated April 22, 1954, directed to the defendant, Masters Mail Order Company of Washington, D. C., annexed hereto as Exhibit R.

19. Duplicate original invoice bearing the name Masters Mail Order Company of Washington, D. C., covering the shipment by defendant from Washington, D. C., C.O.D., of one General Electric iron, Model No. F-33, for $9.71, to Natalie Quick at the aforesaid address in New Jersey, annexed hereto as Exhibit S.

20. Carbon copy of a letter from Mrs. F. Eleanor Smith of 116 Columbus Drive, Tenafly, New Jersey, dated April 22, 1954, addressed to Masters Mail Order Company of Washington, D. C. Inc., annexed hereto as Exhibit T.

21. Duplicate original invoice bearing the name
214 Masters Mail Order Company of Washington, D. C., covering the shipment by defendant from Washington, D. C., C.O.D., of one General Electric travel iron, Model No. F-38, for $9.71, to Mrs. F. Eleanor Smith at the aforesaid address in New Jersey, annexed hereto as Exhibit U.

22. Photostatic copy of a mail order form issued by Masters Mail Order Company of Washington, D. C., dated April 20, 1954, directing the shipment by defendant, C.O.D., of a General Electric portable mixer, Model No. M-10, for $14.96, to Mrs. Louise Mackey of 138 Jefferson Avenue, Emerson, New Jersey, annexed hereto as Exhibit V.

23. Duplicate original invoice bearing the name Masters Mail Order Company of Washington, D. C., covering the shipment from Washington, D. C., by defendant, C.O.D.,

of one General Elertric portable mixer, Model No. M-10, for $14.96, to Mrs. Louise Mackey at the aforesaid address in New Jersey, annexed hereto as Exhibit W.

24. Letter dated April 23, 1954 from Norman R.
215 Neubauer of 157 Ramsdell Avenue, Buffalo 23, New York, addressed to "Masters", 66 West 48th Street, New York, New York annexed hereto as Exhibit X.

25. Photostatic copy of a letter signed by Andres R. Cebulski of 93 Ramsdell Avenue, Buffalo 24, New York, addressed to "Masters", 66 West 48th Street, New York, New York, annexed hereto as Exhibit Y.

26. Copy of a Fair Trade Agreement dated September 17, 1952 between General Electric Company and Abercrombie & Fitch, a New York retailer, annexed hereto as Exhibit Z.

27. Copy of a Fair Trade Agreement dated September 8, 1952 between General Electric Company and William S. Rich & Son, Inc., a New Jersey retailer, annexed hereto as Exhibit AA.

28. Copy of a Fair Trade Agreement dated September 19, 1952 between General Electric Company and Haynes Company, a West Virginia retailer, annexed hereto as Exhibit BB.

29. Copy of a Fair Trade Agreement dated December 11, 1952 between General Electric Company and Guy Smith Hardware, a Virginia retailer, annexed hereto as Exhibit CC.

30. Copy of a Fair Trade Agreement dated October 13, 1952 between General Electric Company and Charles H. Edenborn, Inc., a Pennsylvania retailer, annexed hereto as Exhibit DD.

216 31. Copy of a Fair Trade Agreement dated September 13, 1952 between General Electric Company and the Herringshaw Co., an Ohio retailer, annexed hereto as Exhibit EE.

32. Copy of a Fair Trade Agreement dated September 10, 1952 between General Electric Company and Andrew J. Lloyd Company, a Massachusetts retailer, annexed hereto as Exhibit FF.

33. Copy of a Fair Trade Agreement dated October 3, 1952 between General Electric Company and W.J. & J. W. Thoroughgood, a Delaware retailer, annexed hereto as Exhibit GG.

34. Copy of a Fair Trade Agreement dated September 22, 1952 between General Electric Company and Dell's, Inc., a Connecticut retailer, annexed hereto as Exhibit HH.

35. Copy of a Fair Trade Agreement dated September 9, 1952 between General Electric Company and Blum's, Inc., a Maryland retailer, annexed hereto as Exhibit II.

36. Copies of price schedules issued by the plaintiff during the period January 1, 1954 and June 2, 1954,
217 pursuant to the aforesaid Fair Trade Agreements, establishing minimum retail resale prices for certain appliances listed therein, annexed hereto as Exhibit JJ.

B. *Statements of Fact:*

1. The Small Appliance Division of the plaintiff, General Electric Company (hereinafter referred to as "GE") is engaged in the business of manufacturing electric housewares, clocks, automatic blankets, fans and heating pads (hereinafter called "said appliances") and is selling said appliances throughout the States of New York, New Jersey and other States of the United States having fair trade laws, under its trade-mark "General (GE) Electric".

2. GE has expended large sums of money in promoting and advertising said appliances, and has established a valuable reputation and good-will for its said appliances and for the trade-mark under which they are produced and sold.

3. Pursuant to the New York General Business Law, Section 369-a et seq., the Revised Statutes of the State of New Jersey, Sections 54-43 et seq., and the similar fair trade laws of divers other States of the United States, GE has entered into over 12,000 written fair trade agreements with retailers, including over 1,200 in New York and New Jersey alone.

218 4. Exhibits "Z" to "II", inclusive, are true copies of valid existing fair trade agreements entered into by GE with retailers respectively located in the States of New York, New Jersey, West Virginia, Pennsylvania, Ohio, Massachusetts, Delaware, Connecticut and Maryland, all of which States have fair trade laws in effect. Exhibit JJ hereto are true copies of price schedules issued pursuant to said agreements.

5. Said agreements (Exhibits "Z" to "II", inclusive) are all in substantially the same form and under said agreements GE had and has the right to, and did, stipulate minimum retail resale prices for said appliances.

6. The appliances which are the subject matter of said agreements and which bear the GE trade-mark "General (GE) Electric" are in fair and open competition in the States of New York, New Jersey and other States of the United States having fair trade laws with appliances of the same general class produced by others.

7. GE has systematically and repeatedly given notice of the existence of said agreements and the uniform minimum retail resale prices in effect thereunder to in excess of 175,000 known retailers of said appliances.

8. GE has diligently and vigorously enforced said agreements by a widespread program of shopping to ob-
219 tain information as to the observance of its stipulated retail resale prices, and where necessary has instituted legal action to secure compliance.

9. GE, since July 14, 1952, has instituted in excess of 834 such actions in twenty different States, including 410 in New York and New Jersey.

10. One of such actions was instituted in the Supreme Court of the State of New York on November 6, 1952, against Masters, Inc., a New York retailer, whose principal place of business is located at 66 West 48th Street, New York, New York. In that action an injunction *pendente lite* was issued on December 17, 1952, enjoining Masters, Inc. from violating GE's fair trade agreements. Subsequently, on January 20, 1953, Masters, Inc. was fined $750.00 for violating that injunction, which determination was subsequently modified by the Appellate Division of the New York Supreme Court on May 4, 1953 to impose a fine of $250. On February 25, 1953, Masters, Inc. was fined $1,250 for violating that injunction.

11. At the time of the institution of that action, and continuously since that time, Stephen J. Masters has been the President of Masters, Inc.

12. The defendant was organized on December 15, 1953, under the laws of the State of Maryland. At all
220 times all of its outstanding capital stock was owned by Masters, Inc. Masters, Inc. paid $10,000 for such stock by a check dated March 19, 1954. As of October 18, 1954, defendant was dissolved as a Maryland corporation. Since that date the business of defendant, as described below, has been carried on by a corporation bearing the same name but organized under the laws of the District of Columbia on June 18, 1954, with a capital stock of $5,000 provided by Masters, Inc. On October 11, 1954, the assets of defendant were purchased, subject to its liabilities, by the District of Columbia corporation for $5,000. The re-incorporation was undertaken after Congress, in June, 1954, had passed a modern corporation law for the District of Columbia, at the same time repealing the previous antiquated statute. Except for qualifying shares of the

trustees of the District of Columbia corporation, all of the stock of defendant is owned by Masters, Inc.

13. On or about March 15, 1954, the defendant herein opened a retail store at 425 Seventh Street, N.W., Washington, D. C., in premises consisting of a basement, a main floor and two upper stories. These premises were leased for a period of one year with an option to renew. The lease since has been renewed. The store is the only
221 one maintained by defendant. In it defendant maintains an inventory of various types of merchandise, including merchandise manufactured by GE. All such merchandise, including that manufactured by GE, is available for sale over the counter and by mail.

14. In establishing defendant's place of business in the District of Columbia, Masters, Inc. and defendant had the intention, among other things, to engage in a mail order business from the District of Columbia with consumers located in all States of the United States, including those with fair trade laws, at prices which were below those fixed in fair trade contracts authorized by such laws, but which were profitable to defendant. Counsel for Masters, Inc. and defendant had advised that a mail order business with consumers in fair trade States was lawful.

15. From its place of business in the District of Columbia, defendant has made shipments by mail directly to consumers in various States of the Union at prices which are below the prices which GE has stipulated in its fair trade agreements with retailers.

16. Defendant's sales of GE merchandise to consumers in other States have been made pursuant to orders received in the District of Columbia from such consumers in other States and have been filled by direct shipments originating from the District of Columbia, either by mail
222 or by other carriers.

17. Since the opening of defendant's store in the District of Columbia, more than two-thirds of its aggregate sales

have consisted of over the counter sales. During the period March 15, to June 2, 1954, such aggregate sales were in the approximate amount of $60,000.

18. GE products sold by defendant have been acquired in part from Masters, Inc. and in part through purchase from distributors located in the District of Columbia, including General Electric Supply Company, a division of General Electric Distributing Corporation, a wholly-owned subsidiary of GE, which is one of seven franchised GE, distributors in the District of Columbia.

19. Defendant's store in the District of Columbia is under the supervision of an employee who is occupied full time with his duties pertaining to that store. In addition to the supervision, there are four other employees occupied full time in transacting the business of that store, including salesmen, shipping clerks and secretarial help.

20. Defendant had knowledge of the existence of the aforesaid fair trade agreements entered into by GE and various retailers in New York, New Jersey and the divers other States having similar fair trade laws prior to the commencement of business by the defendant.

21. Defendant had knowledge of the existence of the minimum retail resale prices stipulated by GE for said appliances under the aforesaid agreements prior to the acquisition by the defendant of any of the said appliances.

22. During the period December 15, 1953, to June 2, 1954, the following residents of New York (all of whom were officers, stockholders, employees, directors or agents of Masters, Inc.) held the offices shown beside their names in defendant corporation:

Stephen J. Masters	President
Anthony Masters	Vice President
Winifred Masters	Secretary
Vincent Bongiorno	Treasurer

23. During the aforesaid period, all of said officers of defendant occupied offices on the premises of Masters, Inc., at 66 West 48th Street, New York, New York, which were the same offices occupied by them as officers, directors, employees or agents of Master, Inc. in their respective capacities with Masters, Inc.

24. During the aforesaid period, the following books and records of defendant were kept at 66 West 48th Street, New York, New York.

Cash receipts and cash disbursements
General ledger
Unpaid bills file
224 Duplicate sales tickets.

During the aforesaid period, the following books and records of defendant were maintained by the defendant in Washington, D. C.:

Itemized record of daily receipts
Record of all bank deposits
Record of all orders shipped or delivered
Record of time payment sales (over the counter only)
Record of open charges (over the counter only)
All correspondence files
Purchase orders
Warehouse storage inventory record
Merchandise receiving record
Mailing lists and files

25. During the aforesaid period, defendant's supervisor in Washington, D. C., forwarded a daily report to its officers in New York, showing receipts, cash disbursements, and shipments.

26. During the aforesaid period, defendant's President, Stephen J. Masters, was the only person authorized to sign checks on its behalf and he signed all checks which it issued. All bills received by defendant in Washington, D. C., were forwarded for payment to its Presi-

dent at 66 West 48th Street, New York, New York, and were paid by check signed by him and drawn on defendant's bank account in The Bank of Commerce and Savings, Washington, D. C. During that period defendant made only petty cash payments from its store in Washington, D. C. for postage and postage due, stationery
225 and cleaning supplies, express and freight charges and salary advances to employees.

27. During the aforesaid period Stephen J. Masters visited Washington, D. C., in connection with defendant's business on three occasions, in each case arriving and leaving on the same day. Otherwise he supervised defendant's business by regular daily telephone calls and by mail. During the same period none of defendant's other officers visited Washington, D. C., on its business.

28. All policy decisions affecting defendant's business during the aforesaid period were made at the offices of its officers on the premises of Masters, Inc. at 66 West 48th Street, New York, New York (except those made in Washington, D. C., on the occasion of the aforementioned visits of Stephen J. Masters). Defendant's supervisor in Washington had discretion in effectuating those policies.

29. Defendant's President had supervision and control of the preparation and publication of the mailing piece, of which Exhibits A and B attached hereto are specimens. Said supervision and preparation was principally carried out in his office at 66 West 48th Street. Exhibits A and B were respectively received by the addressees in New Jersey and New York via United States mail originating in Washington, D. C.

226 30. 325,000 copies of said mailing piece were initially printed by Thompson Printing Company of 250 West 54th Street, New York. They were delivered to Masters, Inc., in New York, which paid $1,803.01 for the printing. This amount was subsequently billed to defend-

ant on March 9, 1954 and April 10, 1954 and was paid by defendant on November 18, 1954.

31. At the request of Stephen J. Masters, President of defendant and Masters, Inc., one of the employees of Masters, Inc. named William Fishman caused 300,000 copies of this mailing piece to be addressed in New York to persons on the mailing list of Masters, Inc. Addressograph plates owned by Masters, Inc. were used for this purpose.

32. Subsequently, these 300,000 copies of the mailing piece were shipped by truck to Washington, D. C., and from there were mailed to prospective customers in New York, New Jersey and other fair trade States. The mailing piece offered GE appliances for sale at less than its fair trade prices, when ordered by mail from defendant in the District of Columbia. Masters, Inc. paid the Postmaster of Washington, D. C., $3,000 for the postage charges incurred in mailing the 300,000 copies and, subsequently, billed
227 defendant therefor on March 4, 1954, for that cost and was repaid on March 29, 1954.

33. The 300,000 copies of this mailing piece were delivered by Masters, Inc. to defendant in Washington, D. C., along with a shipment of merchandise and defendant was never separately billed by Masters, Inc. for the delivery of said mailing pieces.

34. Defendant's President, from his office in New York also supervised and controlled preparation of defendant's order blanks, of which specimens are attached hereto as Exhibits C, D, I, K, M, O and P. This was initially printed by Thompson Printing Company of New York in 10,000 copies. A bill for this printing was initially paid by Masters, Inc. which subsequently, on July 1, 1954, billed defendant for the same but has not yet been paid. A subsequent printing of 5,000 copies was ordered by defendant and paid for by it on August 10, 1954.

35. Part of the copies of this order blank were sent to defendant for its use in Washington, D. C. The remainder

were retained by Masters, Inc., which kept them behind the appliance counter at its place of business in New York City, where it had an appliance display.

36. The copies of the aforesaid order blank
228 retained by Masters, Inc. were distributed by employees of Masters, Inc. at its New York store to persons who sought to buy GE appliances at less than fair trade prices or who asked for order blanks for "your Washington store." Master's employees were instructed to inform such persons that if they so desired they could obtain GE fair traded appliances at less than fair trade prices from defendant by mail orders sent to the District of Columbia.

37. Stephen J. Masters, President of defendant and Masters, Inc., supervised preparation of the letter, of which specimens are attached hereto as Exhibits E and F. It was printed in 1,000 copies by Graphic Letter Service of New York City and paid for by Masters, Inc., pursuant to a bill received on February 24, 1954.

38. During the period December 15, 1953 to June 2, 1954, Masters, Inc. sent copies of this letter to persons who attempted to make mail order purchases from it of GE appliances at less than the fair trade price. The letter was accompanied by copies of defendant's mail order form with the name of the mail order patron typed in by an employee of Masters, Inc. but which was otherwise left blank. Exhibit D is a sample of such a blank pre-
229 pared by Masters, Inc. Exhibit F is a sample of the letter, with a written notation made by an employee of Masters, Inc.

39. Exhibit G is a sample of a catalogue and mail order form of defendant which was prepared by William Fishman, an employee of Masters, Inc., acting under the supervision and control of defendant's President, at his office in New York City. It was printed by Thompson Lithograph Service of New York City. The original printing

was 110,800 copies, the cost of which was billed directly to and paid by defendant on August 10, 1954. A subsequent printing, comprising 104,000 copies, was billed to and paid by Masters, Inc., which billed defendant therefor but has not yet been paid.

40. Masters, Inc. and defendant contracted in New York City with Circulation Associates, 226 West 56th Street, New York City, for tying, binding and mailing costs of Exhibit G (other than postage). Under the "patron mailing system", they were mailed from Washington, D. C., to "Patrons" in selected towns in Pennsylvania.

41. Exhibit H is a mailing piece offering merchandise for sale at specified prices only by Masters, Inc. 230 It was prepared under the supervision and control of Stephen J. Masters, President of Masters, Inc. and of defendant. It was addressed to "Patron, Letter Carrier Route, Local," and bore the return address of Masters, Inc.

42. Copies of Exhibit H were distributed by hand on the premises of Masters, Inc. in New York City.

43. Schedule A annexed hereto shows sales of GE appliances by Masters, Inc. to defendant during the period February 16, 1954, to September 14, 1954. During the same period defendant purchased merchandise manufactured by GE in greater quantities from GE's franchised distributors in the District of Columbia.

44. As of June 2, 1954, defendant had not paid Masters, Inc. for its purchases of GE appliances but subsequently made payments therefor on November 18, 1954, pursuant to bills previously rendered.

45. During the period December 15, 1953, to June 2, 1954, defendant

(i) sent mailing pieces and order blanks, of which Exhibits A, B, C, D, G, I, K, M, O and P are specimens, from Washington, D. C., listing GE appliances at less than fair

trade prices, to residents of the following States with fair trade laws in effect, and

231 (ii) sold GE appliances by mail from Washington, D. C., to residents of the following States with fair trade laws in effect at less than fair trade prices:

New York
New Jersey
West Virginia
Virginia
Pennsylvania
Ohio
Massachusetts
Delaware
Connecticut
Maryland

46. All shipments listed in the foregoing paragraph 45 were made pursuant to mail orders received directly from the purchaser at defendant's place of business in Washington, D. C. All such orders were filled with merchandise shipped in original factory cartons from Washington, D. C. The cost of such shipments was paid by defendant. Some of such orders were filled on a C.O.D. basis, but the great majority were filled pursuant to orders which were accompanied by prepayment of the purchase price.

47. In the case of each of such mail order sales, including C.O.D. sales, the contract of sale bore the notation "Sold to" immediately preceding the purchaser's name.

In each case, also, the contract of sale included as one
232 of its terms that the purchaser could return the article purchased for refund or exchange at any time within thirty days of receipt by returning the article in its original condition and carton. In approximately five cases, defendant refunded the purchase price upon the customer's return of the merchandise.

48. In approximately five cases, the customer refused to accept merchandise shipped by defendant on a C.O.D.

basis. In such cases, defendant did not seek to collect the purchase price.

49. During the months of April and May 1954, GE appliances were purchased below fair trade prices pursuant to mail orders prepared and sent to defendant in Washington, D. C., by eight residents of New York or New Jersey, who were then employed by Ralph Piper, a private investigator of New York City, who had been hired by GE to investigate defendant. In each case the goods were supplied to the purchaser by mail from Washington, D. C., on a C.O.D. basis. In each case the purchaser paid the purchase price, plus C.O.D. charges, and defendant prepaid the postage.

50. The articles purchased, the fair trade price, the purchase price and the annexed exhibits relating thereto are shown in the following table:

233

Article	*Fair Trade Price*	*Defendant's Price*	*Related Exhibits*
G.E. Steam Iron, Model F-50	$17.95	$14.21	I & J
G.E. Iron, Model No. F-33	$12.50	$9.71	K & L
G.E. Toaster Model No. T-82	$21.95	$17.96	M & N
G.E. Toaster Model No. T-82	21.95	$17.96	O
G.E. Portable Mixer, Model No. M-10	$19.50	$14.96	P & Q
G.E. Iron, Model No. F-33	$12.50	$9.71	R & S
G.E. Iron, Model No. F-38	$12.50	$9.71	T & U
G.E. Portable Mixer, Model No. M-10	$19.50	$14.96	V & W

51. Of these eight orders, two were sent in the form of a letter from the purchaser; one on an order blank of

defendant "given" to the purchaser; another on a similar blank received from defendant by mail; and four on such blanks obtained by visits to the store of Masters, Inc. at 66 West 48th Street in New York City.

52. In six instances order blanks issued by defendant were received by investigators employed by Ralph
234 Piper on visits to the premises of Masters, Inc., in New York City, and the substance of the conversations preceding the procurement of the forms were as follows: ("I" indicating the Investigator and "Clk" employees of Masters, Inc.)

(a) *Investigator Bernard M. Madon*

"I: Where are your GE toasters?

Clk: We don't have it in stock. (He started walking away.)

I: You mean you don't carry GE?

Clk: You have to get them through the mail in Washington; it's a fair trade item.

I: Can I get a mail order blank here?

Clk: Yes, wait, I'll get you one.

(The clerk handed me a mail order form.)"

(b) *Investigator Gladys Nicholson.*

"I: How is the new Washington store doing?

Clk No. 1: Fine, but it is a mail order house—you know a lot of items are fair-traded and we cannot sell them here, but you can order them from Washington and get your discount.

I: I want to order something. May I have an order blank and price list?

Clk No. 1: I cannot give you one. You can write and they will send you one.

235 I: But I want to order it now.

Clk No. 1: You can see Mr. Vincent over in the middle of the floor. He may give you one.

Clk No. 2: May I help you?

I: I am looking for Mr. Vincent.

Clk No. 2: He is out for lunch. Can I help you?

I: I want to order something from your Washington store.

Clk No. 2: Go over to a clerk there at the back wall by the appliances and he will give you an order blank."

(c) *Investigator Jane C. Ludden.*

"I: I'd like that GE portable mixer, please.

Clk: It's $19.50. All GE products are price fixed by law. No discounts. (The clerk pointed to a shelf where a GE steam iron, Model No. F-50 was plainly marked $17.95.)

I: Damn!

Clk: Why?

I: I've a mother.

Clk: Don't we all?

I: Yes, but mine has the GE mixer and so, of course, must have the portable to complete the picture.

Clk: Just a minute. (The clerk took a white printed sheet from under the counter and folded it,
236 placing it in folds of a price list advertising Master's 18th anniversary sale which I had received upon entering the store and which I had placed on the counter.)

Read this after you leave the store. It will answer your problem."

(d) *Investigator Jean Joyner.*

"I: I want a GE steam iron.

Clk: We don't keep those on display because they are fair traded and we can't sell below the list price, which is $17.95.

I: Don't you have a store in Washington?

Clk: Yes you can do that.

(The clerk reached for an order blank.)

I: Do you give discounts there?

Clk: Yes. (handing me an order blank) Tuck this under your arm.

I: Thank you.

Clk: So many people ask for a GE. I don't know why it is so popular. There are other makes which are superior."

(e) *Investigator Barbara J. London*

"Clk: May I help you?

I: I was interested in buying a toaster. However, you don't have the toaster I want. Could I possibly have an order blank for the Washington store?"

237 (f) *Investigator Michael Calogridis.*

"I: I am in the market for a GE steam iron.

Clk: No discount on that.

I: How much is it?

Clk: $17.95; they're over there at that other counter.

I: Thanks.

(I walked over to the second counter and approached a second clerk who wore a circular button pinned to his shirt bearing the name 'M. Weiss.' In substance, the following was my conversation with the second clerk.)

I: I understand you have a GE steam iron over here.

Clk: That's right. Here you are. That will be $17.95.

I: Don't you have a store in Washington?

Clk: Yes, that's right.

I: You give discounts there, don't you?

Clk: That's right.

I: Let me have an order blank please.

Clk: Here you are, sir.

I: Thanks."

53. During the months of April and May 1954, 238 two residents of Buffalo, New York, who were employees of Pinkerton National Detective Agency, hired by GE for the purpose, wrote Masters, Inc., at its premises at 66 West 48th Street, New York City. One requested a General Electric fan, Model No. T-1, and the other a General Electric mixer, Model No. M-12, at the prices specified in defendant's price list. Checks reflecting such prices were enclosed with the letters, in the amount of $56.21 for the fan and $33.71 for the mixer. These letters are annexed as Exhibits X and Y.

54. Masters, Inc. refused to fill either of the orders described in the foregoing paragraph 53. On the reverse side of the letter ordering the fan, an employee of Masters, Inc. wrote:

"Return to sender. We can't discount GE T-1. No doubt he means Washington store."

This letter and the enclosed check were returned to the sender, along with a letter from Masters, Inc., a specimen of which is annexed as Exhibit F.

55. The letter and check for the mixer were also returned to the sender, along with a similar form letter, annexed hereto as Exhibit E, and a copy of defendant's mail order form, annexed hereto as Exhibit D. An em-
239 ployee of Masters, Inc. had typed in the name of the sender following the phrase "Sold To" on Exhibit D but had made no other notation on the form.

WHITE & CASE
Attorneys for Plaintiff

JOSEPH F. RUGGIERI
Attorneys for Defendent

Schedule A

240 Sales—General Electric Products.
From Masters

To Masters Mail Order Company

Date	*Charge No.*	*Amount*
1954		
2/16	DO3160	$ 199.70
2/25	DO3297	397.98
2/25	DO3298	53.13
3/4	DO3612	138.00
3/11	DO3705	227.00
3/22	DO3584	72.66
3/16	DO3786	307.92
3/16	DO3787	390.00
3/16	DO3790	34.50
3/24	DO3813	25.55
3/31	DO3923	80.88
4/10	DO4167	229.95
4/19	DO4301	742.82
4/24	DO4388	9.48
4/27	DO4631	127.16
4/29	DO4657	52.36
5/11	DO4807	4.46
5/21	DO5070	26.29
7/2	DO6044	2.24
7/13	DO6231	91.98
4/23	DO4383	390.00
7/22	DO6461	143.79
7/28	DO6565	56.10
8/13	DO6858	6.52
6/5	DO5367	375.00
8/31	DO7224	47.00
8/27	DO7379	98.64
9/4	DO7611	899.88
4/7	DO7617	24.10
9/14	DO7765	413.34
		$5,732.87

241 Mr. Barton: I offer as plaintiff's Exhibits Exhibits A through JJ, which are identified in the stipulation.

(Plaintiff's Exhibits A-JJ received in evidence.)

Mr. Weslan: No objection.

The Court: Both sides rest.

Mr. Barton: Plaintiffs moves that the pleadings be conformed to the proof.

Mr. Weslan: Defendant so moves, too.

The Court: Any objection?

Mr. Weslan: No objection.

Mr. Barton: No objection on the other side.

The Court: Motion then granted, by consent.

Mr. Weslan: Now, as far as the defendant is concerned, the defendant moves that the pleadings be conformed to the proof, or whatever pleadings were introduced on behalf of the defendant.

Mr. Barton: No objection.

Plaintiff rests.

The Court: The defendant's motion is granted. Both sides rest.

Mr. Weslan: That is right.

242 The Court: This matter is to be finally submitted by both sides on or before March 18, and counsel may arrange to exchange original memoranda, reply memoranda at any time before then so long as by March 18th the matter is finally submitted; and the matter is now set down for March 22nd, at an hour to be subsequently fixed on that day, for oral argument.

Mr. Barton: Very good your Honor. I have discussed the matter with Mr. Diamond, who is trial counsel for the defendant, and we have agreed that we will not have reply memoranda; in other words, we have so fully briefed the question before that we will submit memoranda on the 18th.

The Court: All right.

Exhibit Z

Not for use in the District of Columbia or in the States of Florida, Missouri or Texas

GENERAL ELECTRIC COMPANY

Small Appliance Division
Bridgeport, Conn.

Fair Trade Agreement

AGREEMENT made this 17th day of Sept. 1952 at Bridgeport Connecticut, by and between General Electric Company, a New York Corporation, (hereinafter called General Electric,) acting through its Small Appliance Division and Abercrombie & Fitch Co., 19 East 45th Street, New York, New York (hereinafter called Dealer).

WHEREAS, the General Electric products now or hereafter manufactured and made subject to this agreement are and will be distributed under General Electric's trademark or brand, GENERAL ELECTRIC in free and open competition with products of the same general class produced by others, and

WHEREAS, Dealer is engaged in the sale of such products, and

WHEREAS, the parties, each on its own behalf, desire to avail themselves of the Fair Trade Acts and the Acts of Congress now and hereafter in effect, particularly of the Fair Trade Act of the State in which Dealer sells the General Electric products,

NOW, THEREFORE, in consideration of the premises, the parties agree as follows:

1. Dealer hereby acknowledges receipt of the list of fair trade prices on General Electric products, attached hereto and made a part hereof, establishing the minimum retail prices for the said products described therein.

2. Dealer agrees that, except as otherwise specifically permitted by any applicable Fair Trade Act or other similar statute, it:

a. will not advertise, offer for sale, or sell any of the said General Electric fair traded products at less than the minimum retail prices stipulated by General Electric, plus in each sale the amount of all applicable sales and excise taxes,

b. will not in connection with any sales of said fair traded products make any refunds, discounts, allowances, or concessions of any kind or character which will have the effect of decreasing its selling price below the minimum retail prices so stipulated by General Electric,

c. will not advertise, offer for sale, or sell any of said fair traded products for which minimum retail prices have been stipulated by General Electric hereunder, in combination with other merchandise at a single, combination or joint price.

3. General Electric may, from time to time, in its absolute discretion, withdraw any or all of said products from its list of fair trade prices; may add products thereto for which minimum retail prices are stipulated and may change or revise the minimum retail prices for the said products listed therein. In the event of any such withdrawals, additions, changes and revisions in said list, General Electric will give prompt notice to the Dealer in writing, by personal delivery or by mail.

4. This agreement shall continue in effect from the date hereof until terminated by either party upon ten day's written notice to the other; provided, however, that in the event of such termination by the Dealer the provisions hereof shall nevertheless apply to such products then in the Dealer's possession; and in any event the Dealer shall not be released from any obligation thereafter in respect to sales of said products imposed upon it by any applicable Fair Trade Act or other statute.

5. This agreement shall not apply to sales made in any state in which the resale price control herein provided for is not lawful under any applicable Fair Trade Act or other statute, or rule of law or public policy.

6. The provisions of this Agreement shall be binding upon the successors and assignees of the parties hereto.

General Electric Company
Small Appliance Division

By /s/ R. E. Boisy
Manager-Marketing WP

Abercrombie & Fitch Co.
Dealer

By /s/ A. M. Schaefler,
Vice-President
Title

Street 19 East 45th Street
City New York
State New York

EXHIBIT F

MASTERS, INC.
for Everything You Need

66 West 48th Street • New York 19, N. Y.
Rockefeller Center's Next Door Neighbor
PLaza 7-2323

Dear Patron:

Thank you for your recent mail order for:

A court injunction obtained against us by the manufacturer of the merchandise you ordered prevents us from selling this merchandise to you at below the Fair Traded List Price arbitrarily fixed by the manufacturer. We regret we can only offer this merchandise to you at the Fair Traded List Price of $

Despite this and other attempts to shackle Free Enterprise and Competition, Masters is and will continue fighting against Price-Fixing by manufacturers so that we may bring you the greatest possible savings.

There are no applicable Fair Trade laws in Washington, D. C. We are reliably informed that

MASTERS Mail Order Company of Washington,
D. C., Inc.
425 Seventh Street, N. W.
Washington 4, D. C.

offers the merchandise you ordered at a large discount. If you are interested in making the purchase through MASTERS Mail Order Co. of Washington, D. C. Inc., please correspond directly with them at the above address.

May we respectfully call to your attention that this unique case does not in any way affect the large savings you can expect on purchases of almost all other famous brands at Masters, Inc. in New York.

Very truly yours,

MASTERS, INC.

√ Check With Masters Before You Buy! √

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JUN 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1124~~ 224

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

v.

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC.,
Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDGAR E. BARTON
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IN THE

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No.

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

v.

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC.,
Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, General Electric Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case pursuant to its decision dated May 15, 1957.

Opinions Below

Appendix pp. 27-49

Reversing Bicks, D.J., 145 F. Supp. 57 (S.D.N.Y., 1956)

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1957. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the McGuire Act must be construed to prevent New York from protecting its domestic trade from the unfair trade practice of deliberately advertising, offering for sale, or selling commodities at prices below the prices stipulated in a contract authorized by New York's Feld-Crawford Act, merely because these injurious practices which have their economic impact on New York's domestic trade take place partly in a jurisdiction which has not sought similarly to protect its domestic trade.

2. Whether, for the purposes of the McGuire Act and the Feld-Crawford Act, the question as to where sales are made should be resolved by looking to the jurisdiction where title passes, the jurisdiction where the seller has its "situs" or the jurisdiction where the market is exploited by activities in that market and in which the economic impact of the sales is felt.

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* The appendix hereto will be referred to as Appendix p. —. The record below will be referred to as Masters' App. p. — and GE App. p. —.

3. Whether New York's Feld-Crawford Act protects New York trade from advertising or offering in New York to sell commodities at unfair prices only in those cases where title is to pass in New York or the seller is located in New York, and whether the McGuire Act so limits such protection by New York.

Statutes Involved

The statutory provisions involved are the McGuire Act and the New York Feld-Crawford Act. They are printed in the Appendix hereto, *infra*, pp. 22-24; 25-27.

Statement of the Case

This petition seeks review of a judgment of the Court of Appeals for the Second Circuit which reversed the judgment of the United States District Court for the Southern District of New York. The District Court's judgment (Masters' App. pp. 2-4), (based upon a decision constituting findings of fact and conclusions of law [Masters' App. pp. 4-16]), entered after a trial without a jury upon stipulated facts (Masters' App. pp. 17-43; GE App. 1-26), enjoined defendant-appellee, Masters Mail Order from advertising, offering for sale or selling in New York certain electrical appliances manufactured and sold by the plaintiff-appellant, General Electric Company (called herein "GE") which bear GE's trade marks, at prices below the minimum retail resale price established for such appliances by GE pursuant to existing retail resale price maintenance agreements in force in the State of New York. It denied injunctions as to nine other jurisdictions because the proof only established sales

taking place in New York. Jurisdiction of the cause was retained.

GE is engaged in the business of manufacturing and selling electric irons, toasters, fans, clocks and other portable electrical appliances usable wherever electricity is available. These appliances are in fair and open competition with electric appliances of the same general class which are produced and sold by others. The economies of mass production permit these appliances to be sold at reasonable prices. To create a mass market for these appliances, GE has expended and is expending large sums of money in developing and promoting consumer demand for these appliances and has established a valuable reputation and good will for them and for the trademarks under which they are produced and sold (Masters' App. p. 22).

The appliances manufactured by GE are sold by GE to wholesale distributors who in turn sell to thousands of retailers in New York and the other states of the United States for resale to the consuming public. In order to protect the good will and valuable reputation of these appliances and the trademark under which they are sold, not only among consumers, but also among the many thousand retailers who distribute these appliances, and in order to protect its lawful marketing method of widespread distribution which allows GE to benefit from such good will and consumer acceptance, GE has entered into resale price maintenance agreements with retailers throughout the State of New York, as well as in other states where such agreements are permitted by law. Pursuant to those agreements GE established minimum retail resale prices for these appliances (Masters' App. p. 23). When such

minimum resale prices have been established, all retailers within the State who have knowledge of those prices are bound to sell at no less than the prices stipulated pursuant thereto.

GE seeks to foster the small retailer as a purchaser of its appliances and as a salesman for those appliances, so that the retailer's efforts, stimulated by GE's advertising and good will, can create mass distribution. As a result of its policy, a majority of retailers of GE's appliances are small enterprises.

The small retailer wants to stock, display and sell those products because of their trade name and the good will built up by GE. However, it is necessary to provide the small retailer with a reasonable mark-up in order to permit him to stock, display and sell GE products, with the vigor which creates mass distribution and permits mass production.

New York State, by the passage of the Feld-Crawford Act, demonstrated that it desired to provide a reasonable living wage for that independent contractor, the small retailer and protect the good will of the manufacturer which lies at the basis of mass distribution and production.

Congress has twice demonstrated that it wants New York to be able to do so (H. R. Rep. No. 1516, 82nd Cong., 2nd Sess. (1952), pp. 12, 40).

New York has provided for the protection of the interests of the manufacturer and the retailer by the Feld-Crawford Act, which permits GE to preserve its trade name and good will among retailers and consumers and to foster the retailer as a salesman by affording him a reasonable mark-up or wage as an inducement for his efforts.

Congress, by the McGuire Act, has unmistakably provided that New York may enforce this policy as to goods moving in interstate commerce.

On the other hand, defendant, Masters Mail Order Company of Washington, D. C., Inc. (hereafter called "Masters Mail Order"), seeks to wage economic war against the small retailer in New York and to undermine his market for nationally advertised goods. Masters Mail Order believes that it can, without displaying the goods or using any other sales device, sell nationally advertised goods by the sole expedient of announcing its willingness to sell them at lower prices than the retailer who displays or uses sales efforts, can afford (Plaintiff's Exhibits B, C, D, H, I; GE's App. pp. 2, 3, 5, 8, 10).

By so doing, Masters Mail Order obtains a "free ride" on the advertising done by GE and the sales efforts of every retailer who rents space to display GE products or hires salesmen to sell them.

Since July 14, 1952, when the President of the United States signed into law the McGuire Act, General Electric has entered into over 12,000 minimum retail resale price agreements with retailers located in the states of the United States where such agreements are lawful, including over 1,200 in the New York metropolitan area alone. GE has diligently and vigorously enforced those agreements by a widespread program. It has, by notices duly delivered, bound over 175,000 retailers to observe the provisions of those agreements.

One of the lawsuits commenced by GE was brought against Masters, Inc., a New York retailer whose stated policy is to sell Fair Traded merchandise, including that manufactured by GE, at prices below the minimum retail

resale prices established therefor. The New York courts enjoined Masters, Inc. and fined it several times for violation of the injunction (Masters' App. pp. 23-4).

Masters, Inc. then organized Masters Mail Order, of which it owns all the stock. Its officers are the officers of Masters Mail Order (Masters' App. pp. 24-5). Masters Mail Order, by a deliberate campaign conducted nominally from Washington, D. C. (Masters' App. pp. 25-37) which is not a Fair Trade jurisdiction, has continued the assault of Masters, Inc. upon the New York retailer and upon GE's lawful marketing method by handing out in New York through the agency of its parent, Masters, Inc., and by mailing into New York to New York residents chosen in New York by Masters, Inc., mail order forms which recite:

> "MASTERS Mail Order Company of Washington, D. C., Inc. has been established in Washington, D. C. because it is a non Fair Traded area. This means we are permitted in Washington, D. C. to offer you ANYWHERE IN THE COUNTRY SENSATIONAL DISCOUNTS ON FAMOUS BRANDS." (Plaintiff's Exhibit B, Appellee's App. pp. 1-2.)

As the Trial Court found, the officers of Masters Mail Order made their offices in New York and it was in New York that all policy decisions affecting the business were made; it was in New York that all arrangements for initial inventory for Masters Mail Order were made; it was in New York that Masters Mail Order brochures, mailing pieces and order blanks were prepared; it was in New York that the brochures, mailing pieces and order blanks were printed and addressed with the names of New York residents chosen by Masters, Inc.; it was in

New York that the aforesaid mailing pieces were tied and mailed; it was in New York that these aforesaid mailing pieces were received by the customers of Masters, Inc.; it was in New York that Masters Mail Order blanks were distributed over the counter to New York residents by Masters' employees; there was a close relationship between Masters, Inc., the parent corporation, and Masters Mail Order—so close that Masters, Inc. was in fact the agent of Masters Mail Order and performed in New York advertising and made offers to sell on behalf of Masters Mail Order. Further, the Court found that the economic response to the mailing pieces, sales brochures, etc., occurred in New York; that the purchase price was paid by Masters Mail Order customers in New York; that the goods were received in New York and that the effects of the transaction were felt in New York (Masters' App. pp. 4-16).

On the basis of these undisputed findings, the District Court concluded that Masters Mail Order had advertised, offered for sale and sold in the State of New York GE appliances at prices below those stipulated in GE's resale price maintenance agreements with the purpose and effect of exploiting the New York market.

The District Court enjoined Masters Mail Order from continuing its assault upon the New York market. Masters Mail Order appealed.

The Court of Appeals, by a divided vote, reversed the judgment of the District Court holding that New York was powerless to protect against this assault on its domestic market. Three opinions were written. Chief Judge Clark wrote the first. In his decision he stated that Judge Frank, who died after hearing oral argument,

had indicated in an unofficial memorandum that he agreed with Judge Clark's view. Judge Clark's view was that the District Court had erred in finding that title had passed in New York, and that the District Court had erred in giving primary effect to the multiple economic factors involving New York in determining that the place of resale under the McGuire Act and the Feld-Crawford Act was New York.

Judge Clark ignored the manifold activities of Masters Mail Order in New York and that New York was the market affected and the place of economic impact because without citation of authority he read into the McGuire Act a Congressional intent to render the place of passage of title controlling. He thereby forbade New York to prevent intentional injury to New York trade by acts which have their effect in New York and are forbidden by New York law by resort to the fiction that the perpetrators have chosen to have title pass in another jurisdiction. Neither Judge Lumbard nor Judge Waterman agreed with him.

Judge Waterman, who was requested to consider the case by Judge Clark after Judge Frank's death without further oral argument, concurred in the result, but wrote an opinion in which he stated that in his view the question of where title passed was not significant. He too ignored the manifold activities of Masters Mail Order in New York and the fact that New York was the market affected and the place of economic impact. He read into the McGuire Act a Congressional intention to forbid New York from preventing this assault on its trade merely because the perpetrator has a "situs" outside New York. Neither Judge Clark nor Judge Lumbard agreed with him.

Judge Lumbard dissented because, in his view, on the record in this case the District Court had correctly determined that Masters Mail Order had advertised, offered for sale, and sold GE's fair traded appliances in New York at less than the stipulated minimum resale prices, and therefore the District Court had correctly applied the Feld-Crawford Act. He considered the defendant's many activities in New York and the exploitation of the New York market as controlling on the question of where the sale took place.

Reasons for Granting the Writ

1. The Court of Appeals has decided an important question of Federal law vitally affecting the relationship between and among the states of the United States. Its decision will vitiate the expressed intent of Congress that states be allowed to declare certain acts unfair trade practices and to protect their trade from those acts. Moreover, this important question was decided on grounds unsatisfactory to at least two of the Judges of the panel of three who decided the matter in the Court of Appeals. This Court has not passed on the point.

The important question presented is of far-reaching significance: (a) in so far as it affects the administration of state-enacted minimum resale price maintenance laws, which Congress has declared shall be given full effect by the passage of the McGuire Act; (b) in so far as it affects the value of good will and consumer acceptance which owners of trade-marks such as GE have created by large investments in advertising and maintaining a price structure for their products; (c) in so far as it affects the many thousands of retailers who are bound by fair trade laws in

force in the jurisdiction in which they are located and whose livelihood is threatened by Masters Mail Order's activities; (d) in so far as it affects the more than four hundred retailers in New York alone who are under court orders to sell at no less than the prices stipulated in various resale price maintenance agreements (Masters' App. p. 24).

2. The decision of the Court of Appeals is directly in conflict with the principle of a decision of the highest court of the State of New York which construes the Feld-Crawford Act. Thus, in *Rixor Corp.* v. *Goody*, 307 N. Y. 229 (1954), cert. denied, 348 U. S. 863 (1954), the New York Court of Appeals declared that the New York legislature in passing the Feld-Crawford Act intended to protect the home market to the greatest extent within its powers. (See footnote 3 to p. 49 of the Appendix hereto, wherein Judge Lumbard takes note of this determination.) Moreover, the decision of the Court of Appeals is in direct conflict with *Eastman Kodak Co.* v. *Masters, Inc.*, 153 N. Y. S. 2d, 433 (Sup. Ct., N. Y., 1956, not officially reported). In the *Eastman Kodak* case, the New York Supreme Court construed the Feld-Crawford Act as creating a separate tort for advertising the sale of fair traded commodities at prices below those stipulated in fair trade contracts, whether or not the sales were actually consummated in New York. Such a construction of the statute is compelled by the use of the disjunctive ("advertising, offering for sale *or* selling") in the statutory language. Thus, the decision of the Court of Appeals is in direct conflict with the meaning of the clear language of the Feld-Crawford Act, and New York decisions.

3. The decision of the Court of Appeals is erroneous.

A. The clear words of the McGuire Act and its legislative history indicate that Congress intended that the several states be permitted to determine that violation of resale price maintenance agreements was an unfair trade practice and that each state be permitted to protect its trade from such unfair practices regardless of the interstate character of the transactions.

In weighing the respective rights of the State of New York and the District of Columbia to regulate their internal affairs, the Court of Appeals ignored the economic impact of Masters Mail Order activities upon trade policy of New York and ignored the unfair conduct of Masters Mail Order which occurred within the State of New York and decided that the policy of the State of New York should not be protected.

Support can be found for neither of the grounds advanced to uphold this result.

The Court of Appeals erred in importing into the McGuire Act as the controlling test that title pass in a state which had enacted resale price maintenance laws in order for such laws to have valid application anywhere, if that be the ground for its decision.

The clear words of the McGuire Act lend no support for the view that "resale" as used in that Act was intended to mean "passage of title," a technical concept relating to liability for payment of price and risk of loss, and not to the tort of unfair competition.

The clear words of the statute give no indication that Congress intended that the public policy of Fair Trade states should be avoided by judicial imputation to the parties to a trade practice unfair and illegal in one state of an intention to have title pass in some other jurisdiction,

possibly one that the goods only passed through during delivery.

The Court of Appeals erred in importing into the McGuire Act as the controlling test the novel doctrine that a retailer is exempt from state Fair Trade laws no matter what activity he engages in within the Fair Trade jurisdiction, provided he has an immunizing situs in a non-Fair Trade state or district, if that be the ground of its decision. There is simply no warrant for such a test.

The clear words of the statute give no indication that Congress intended that retailers who merely had a "situs" in a non-Fair Trade state could offer customers anywhere in the country the chance to participate in the very kind of transaction Congress was giving states the right to outlaw.

Although it is accepted law that where the words of a statute are clear, resort to legislative history is not appropriate (*Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 588-9 (1922); *U. S.* v. *Missouri & Pacific Railroad Company*, 278 U. S. 269, 278 (1929); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 201 (1946)), the legislative history demonstrates that Congress did not intend the mere place of passage of title on "situs" of the retailer determinative of the applicability of the state enacted resale price maintenance laws.

The McGuire Act had its origin in a bill introduced by Rep. McGuire, designated H. R. 5767. Rep. McGuire made his intentions clear at the outset:

> "The purpose of this measure is to clarify the status of certain state laws, to affirm within specific limits the right of each state to determine its own policy with respect to the regulation of its internal affairs and to enable each state to protect its domestic

"trade from unfair trade practices." 97 Cong. Rec. 13404 (1951)

Judge Waterman erroneously finds support for his position in the legislative history of the McGuire Act. He does this by relying on the rejection by Congress of a proposed amendment introduced by Congressman Cole of Kansas. The Cole Amendment was rejected, as Judge Waterman indicates, for a variety of reasons. However, Judge Waterman relies upon the controversial phrase: "(3) deliver pursuant to a sale, or otherwise deliver," present in the Cole Amendment but absent from the McGuire Act, as support for his belief that Congress intended that a retailer should be governed only by the Fair Trade law of the jurisdiction in which he is located. The omitted phrase would have permitted interference by one state with the activity of another to an extent not here relevant and not being asked by the plaintiff in this case. It would have prohibited, and was intended to prohibit, a retailer in Missouri (whose normal market includes persons who come across the river from Kansas) who has personally sold in Missouri which had not enacted a fair trade law, to a resident of Kansas a commodity fair traded in Kansas from making a delivery into Kansas pursuant to that sale, all the elements of which take place in Missouri. While relying upon this rejection of an amendment not pertinent here, Judge Waterman omits mention of the rejection by Congress of the Keogh Bill which would have specifically accomplished the objective sought by defendant. The Keogh Bill read in part:

> "*Provided*, That nothing contained herein shall apply to advertisements for sale, offers for sale, or sales which originate from or are directed to or are completed within any State, Territory, or the District of Columbia, where such contracts or agreements as are described herein are not lawful by statute: * * *" (H. R. 6925, 82nd Cong., 2d Sess., as reported out on March 13, 1952.)

The legislative history, therefore, if relevant, favors the view taken by the Trial Court and not that put forward by Judge Waterman.

There is thus no statutory warrant and no reason suggested in the legislative history for giving the term "sell" or "resale" such a restrictive meaning. Obviously, it was the intention of both New York, by the passage of Feld-Crawford, and Congress, by the passage of McGuire, to enable a manufacturer to specify prices at which his commodities were to be distributed by others in those states permitting price maintenance. The term "resale" is used in the statutes for the broad purpose of insuring that not only might sales by agents be controlled as to price but also sales by distributors who had bought, paid for and who actually owned the goods, and who therefore were "reselling" them. It follows that both New York and Congress intended effectively to protect the New York market from all forms of distribution which would undermine this public policy. When Masters Mail Order distributes in New York by means which make it indistinguishable for all practical purposes from a New York retailer and when the transactions involved are factually sales in New York for all practical purposes, the legislative policy should be applied and "resale" should be given a meaning which will effectuate that policy.

B. The Court of Appeals failed to recognize that the wrong complained of by plaintiff is an injury to it from tortious conduct by the defendant and that under recognized principles of conflicts of laws, the law of the place of the injury is the law to be applied.

Young v. *Masci*, 289 U. S. 253;
U. S. v. *Thayer*, 209 U. S. 39;
Hunter v. *Derby Foods*, 110 F. 2d 970 (2d Cir., 1940);
Horwitz v. *U. S.*, 63 F. 2d 706 (5th Cir. 1933), cert. denied, 289 U. S. 760;
State v. *Davis*, 87 S. E. 262 (W. Va., 1915);
State v. *Morrow*, 40 S. C. 221 (1893);
Restatement, Conflict of Laws, §377.

In *Young* v. *Masci*, 289 U. S. 253, the Court affirmed a recovery based on injuries received in a New York accident involving a car owned by defendant who had bailed it in New Jersey to a friend. By New York law, unlike the law of New Jersey, the owner of a car is absolutely liable for injuries caused by the negligence of one operating the car with his permission. Mr. Justice Brandeis, speaking for the Court, said:

> "* * * A person who sets in motion in one state the means by which injury is inflicted in another, may, consistently with the due process clause, be made liable for that injury * * *."

So, in *Hunter* v. *Derby Foods*, 110 F. 2d 970 (2d Cir., 1940), the Court imposed liability on a New York concern which sold meat in New York to an Ohio wholesaler. Plaintiff's decedent purchased and ate the meat in Ohio and the Court applied Ohio tort law which placed an absolute liability on the seller of spoiled meat, unlike New York

law which required proof of want of due care. The Court held that sending the food into Ohio was like shooting a firearm across the state line and said:

> "By settled rules of Conflict of Laws, the defendant's liability is measured by the domestic law of Ohio to the same extent as if it had been present and had made the sale there."

In *Hornet* v. *U. S.*, 63 F. 2d 706, the Court declared the sending of lottery receipts into the United States from Mexico illegal and compared them to "bullets that hit their mark" across the line, even though everything complained of occurred while the defendants were "physically in Mexico."

C. The Court of Appeals misconstrued the statutory language common to the Feld-Crawford Act and the McGuire Act.

The Feld-Crawford Act makes it a tort to advertise or offer for sale within the State of New York at below duly stipulated prices, irrespective of whether the sales actually take place there. While there may be limits to this doctrine, the conduct of Masters Mail Order in New York where it is doing business does not require that those limits be here considered.

In *Eastman Kodak* v. *Masters, Inc.*, 153 N. Y. S. 2d 433 (Sup. Ct., N. Y., 1956), the Court held that Masters, Inc. by handing out in New York the identical advertising, shown as plaintiff's Exhibit B in this suit (GE's App. pp. 1-2), was advertising and offering for sale in violation of the Feld-Crawford Act, without regard to the question of where title to the goods would pass.

This result is dictated by the fact that the plain language of the Feld-Crawford Act, like the language of the McGuire Act, speaks disjunctively as "advertising, offering for sale, *or* selling." See *United States of America* v. *DuPont*, June 3, 1957, Opinion of the Court, p. 4. The result is also dictated by Judge Bicks' finding, not discussed by the Court of Appeals, that "[f]or Feld-Crawford to be anything short of a dead letter, defendant's activities must be held within its terms."

A decision of the highest court of the State of New York construing the Feld-Crawford Act, indicates that the legislature of that state intended to exercise its power to protect the home market to the fullest extent possible, e.g., *Razor* v. *Goody*, 307 N. Y. 229 (1954), and hence the determination by the Court of Appeals that the Feld-Crawford Act is not properly construed as creating a separate tort for advertising within New York goods at prices below those lawful in New York, regardless of the place where title passes, is error.

The Court of Appeals attempted to construe the case of *Razor* v. *Goody* as authority for its position, although admitting that there was no discussion in the case to support this view. In *Razor* v. *Goody*, the question was simply whether the Feld-Crawford Act applied to sales directly into interstate commerce. Since, at that time, forty-five states, including all those contiguous to New York retail markets, had similar legislation or public policy, the problem of sales into a non-fair-trade area was not discussed. Whether New York would construe the Feld-Crawford Act to apply to sales to non-fair trade areas, such as the District of Columbia, was not in issue.

D. The Court of Appeals also failed to consider the relative injury to the policies of the State of New York and the District of Columbia. The activities of Masters Mail Order, it is not disputed, have their economic effect in New York and are by New York standards unfair to New York retailers who are adversely affected thereby, as well as to GE.

The right of the District of Columbia "to regulate its internal affairs" (no doubt protected by the McGuire Act), would not appear to be in the least impaired by prohibiting Masters Mail Order from having its agents in New York hand out mail order forms to New York residents, nor by prohibiting its officers and agents in New York from executing strategy designed to exploit the New York market, by preparing in New York, from lists of New York residents, mail order pieces addressed to New York residents which advertise and offer to sell New York residents, while they remain at all times in New York, GE's commodities at prices prohibited in New York. These activities, and others set forth above, of Masters Mail Order in New York clearly support the application of New York law to Masters Mail Order. Prohibiting the relevant conduct of Masters Mail Order on the undisputed facts in this record cannot fairly be said "to allow New York to dominate the economic activities of the District of Columbia (and other like fair trade areas)" (App. p. 34).

E. The Court of Appeals erred in not adopting the view of the District Court that the place of "resale" and the applicability of state enacted resale price maintenance laws can only be discerned by a fair analysis of all the contacts with the various jurisdictions involved, with particular emphasis on the economic facts and their significance in the transaction.

The McGuire Act and the Reed-Crawford Law relate to economic realities and application of those laws can only be made after consideration of the economic facts. There is no warrant for searching for a test such as the passage of title, a concept developed for deciding risk of loss of goods in transit, and applying that test for the sole purpose of restricting the application of resale price maintenance laws.

The court below attributed to buyer and seller the intention to have title pass in the District of Columbia because otherwise the transaction would have been illegal. In determining the intention of the parties to the transaction, Judge Clark held that proof of the seller's intention that title should pass outside the District of Columbia was irrelevant since the fact to establish this intent was not communicated to the purchaser. In other words, the Court has attributed an intention to the parties and declared that it is irrelevant to prove that one of them did not have this intention.

In *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340 (1954), Mr. Justice Jackson, in discussing *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335, set down pertinent criteria for determining the power of one state to apply its law to sales where title may pass in another.

> "That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to

being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market."

It is analysis of this nature, properly applicable to the questions involved, which the Court of Appeals failed to make. It may be noted in passing that, under the test set forth by Mr. Justice Jackson in the above quotation, the rejection by Congress of the Cole Amendment, or at least that portion of it relied upon by Judge Waterman in his discussion of legislative history (App. p. 45), was constitutionally required.

To disregard the active solicitation in the New York market by Master's Mail Order through the use of its New York parent, and to disregard the active invasion and exploitation of the consumer market in New York was error in the court below.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

The McGuire Act

(Public Law 542; 82nd Cong.; 2nd Sess. (July 14, 1952), c. 745, §2; 66 Stat. 632; 15 U. S. C. 45)

45 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia,

which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon or interference with, commerce.

(5). Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act,

1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[The purpose of the McGuire Act is stated in Section 1 of the Act, 66 Stat. 632 as follows:]

"That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

The New York Fair Trade Law

(New York General Business Law §369-a et seq.)

The Feld-Crawford Act

(L. 1935, c. 976, as repealed and reenacted by L. 1940, c. 195, as amended by L. 1941, c. 39, §38; Section 369-a, et seq. of the General Business Law of the State of New York)

§369-a. Price fixing of certain commodities permitted.—1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee of producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

3. This article shall not be deemed or construed to apply to, or to fix or limit prices at which any commodity may be sold or offered for sale to the State of New York or to any administrative department of the state government, to any political subdivision of the state, to any municipality, to any public corporation or authority now or hereafter created by the legislature, to any college or university library or any public library incorporated by an act of the legislature, or by the board of regents of the state education department or registered by the state education department.

§369-b. **Unfair competition defined and made actionable.**—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

§369-c. **Exceptions.**—This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to the sale or resale prices.

§369-d. Definitions.—The following terms, as used in this article, are hereby defined as follows: "Producer" means grower, baker, maker, manufacturer or publisher. "Commodity" means any subject of commerce.

§369-e. Effect of partial invalidity.—If any provision of this article is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 198—October Term, 1956.

(Argued December 4, 1956. Decided May 15, 1957.)

Docket No. 24370

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellee,

—v.—

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC.,
Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and
LUMBARD and WATERMAN,[1] *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge.*

Masters Mail Order Company of Washington, D. C., Inc., appeals from an order, D. C. S. D. N. Y., 145 F. Supp. 57, under the New York Fair Trade (Feld-Crawford) Act, N. Y. General Business Law §§369-a to 369-e, enjoining it from selling, offering to sell, or advertising in New York

[1] Judge Frank heard arguments on this appeal and wrote a memorandum supporting his tentative vote for reversal, but died before he could prepare an opinion. Judge Waterman was then invited to, and consented to, serve as the third member of the panel.

certain trade-marked appliances manufactured by General Electric Company at prices below those specified in the latter's resale price maintenance agreements with New York retailers. Reversed and action dismissed.

NORMAN DIAMOND, of Arnold, Fortas & Porter, Washington, D. C. (William D. Rogers, of Arnold, Fortas & Porter, Washington, D. C., and Joseph F. Ruggieri, of Ruggieri & Ruggieri, Brooklyn, N. Y., on the brief), *for defendant-appellant.*

EDGAR E. BARTON, of White & Case, New York City (Howard J. Aibel, of White & Case, New York City, on the brief), *for plaintiff-appellee.*

CLARK, *Chief Judge*:

This is an appeal from a decision, D. C. S. D. N. Y., 145 F. Supp. 57, enjoining a mail order discount house in the District of Columbia from advertising, offering for sale, or selling plaintiff-manufacturer's products in New York below New York "fair trade" prices.[2] The action was brought under the New York Fair Trade (Feld-Crawford) Act, N. Y. General Business Law §§369-a to 369-e, and our jurisdiction rests on the diversity of citizenship of the parties. All the facts were stipulated in advance of trial.

[2] We use the terms which seem to be current, viz., "fair trade," as opposed to "free trade."

Appendix

Since the passage of the McGuire Act, 66 Stat. 632, 15 U. S. C. §45(a)(1)-(5), the plaintiff, General Electric Company, has entered into numerous fair trade agreements with retailers in New York and other states, and has systematically given notice of the agreements and the uniform minimum resale prices in effect to the 175,000 known retailers of its products. It has vigorously enforced the agreements, by lawsuits when necessary. The defendant is a retail store in the District of Columbia which sells General Electric appliances both over the counter, and by mail order. Two-thirds of its sales are over the counter. It is a wholly owned subsidiary of Masters, Inc., a New York retail corporation, and has been controlled and closely supervised by the parent corporation at all relevant times. The parent is not a party here. In 1952 the parent was enjoined from violating the plaintiff's fair trade contracts and the following year it was twice fined for violating the injunction. That year the defendant was organized in Maryland and the following year its place of business was moved to the District of Columbia, where there are no fair trade laws. The last move was intended to permit the defendant to sell General Electric appliances to consumers in fair trade states below fair trade prices by direct mail order, the defendant having been advised that such sales would be legal.

Defendant has shipped General Electric appliances from its store to consumers in New York at prices below those set by the plaintiff with its signatory retailers. These sales were pursuant to orders received in the District of Columbia on order forms marked, "THIS ORDER IS SUBJECT TO ACCEPTANCE BY MASTERS MAIL ORDER COMPANY

IN WASHINGTON, D. C." and "NO CHARGE FOR SHIPPING." Some of the orders were filled on a C.O.D. basis, but the great majority were filled pursuant to orders which were accompanied by prepayment of the purchase price. Each order blank bore the notation "SOLD TO" immediately preceding the purchaser's name, and as one of the terms it announced that the purchaser could return the article purchased for refund or exchange within thirty days of receipt by returning the article in its original condition and carton. In approximately five cases defendant refunded the purchase price upon the customer's return of the merchandise.

The order blanks were distributed by both the defendant in Washington and its parent, which kept them behind the appliance counter at its place of business in New York for distribution to New York consumers who sought them or tried to buy General Electric appliances for less than fair trade prices. To mail requests for appliances below fair trade prices the New York parent store replied that the items could be purchased from the Washington subsidiary, and it enclosed copies of the mail order form of the defendant. Copies of the defendant's catalogue were printed by the parent in New York and sent to the defendant in the District of Columbia, whence they were mailed to prospective customers in fair trade states. And the parent distributed other advertising material concerning the defendant's bargains directly to New York consumers in New York. The appliances sold by the defendant were acquired in part from the parent in New York and in part through purchase from distributors located in the District of Columbia, including a division of General Electric Supply Company, a wholly-owned subsidiary of the plaintiff, which

is one of seven franchised General Electric distributors in the District of Columbia.

The district court, relying heavily on the circumstances surrounding the formation of the defendant and its close supervision by the New York parent, held that the defendant advertised, offered for sale, and sold GE appliances in New York below the fair trade prices; that this violated New York's Feld-Crawford Act; and that the Feld-Crawford Act was sanctioned by the McGuire Act. Judge Bicks' reasoned opinion, reported at 145 F. Supp. 57-64, is a full exposition of the arguments available for plaintiff's position and for the rather far-reaching injunction he issued. He distinguished two earlier district court cases upholding the legality of the defendant's operations in another fair trade jurisdiction on the ground that there no sales had been made within a fair trade state. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, D. C. D. Md., 140 F. Supp. 165, subsequently affirmed, 4 Cir., 240 F. 2d 684; *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C.*, D. C. D. Md., 128 F. Supp. 457. But we are constrained to agree with these decisions, which we think are not properly to be distinguished.

Our first question is whether the Feld-Crawford Act, so applied, conflicts with the Sherman Antitrust Law's ban on enforcement of resale price maintenance agreements as to goods moving in interstate commerce. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. Although the McGuire Act carves some exceptions to this long-standing national policy against restraints on trade, we are "bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 316.

Appendix

Subsections (a)(2) and (3) of §2 of the McGuire Act, 15 U. S. C. §45(a)(2) and (3), are printed in the margin.[3] The last part of subsection (a)(2) restricts the exception for resale maintenance contracts to contracts governing resales in jurisdictions that have adopted "fair trade" as a policy. A contract made in a fair trade state, but governing a resale in a non-fair trade state, would be illegal by the terms of the subsection. Subsection (a)(3) creates an exception for enforcement actions only when the price-cutter is undercutting "prices prescribed in such contracts"—that is, the contracts described in the previous subsection. Therefore no enforcement action lies unless the resales in question occur in a fair trade state.

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[3] "§45. *Unfair methods of competition unlawful; prevention by Commission.*

"(a)(1) * * *

"(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

This was the construction given the statute by Judge Chesnut in *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md., 128 F. Supp. 457, 462, and by Judge R. Dorsey Watkins in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra,* D. C. D. Md., 140 F. Supp. 165, 178; and see also the opinion of Judge Soper affirming the latter decision, 4 Cir., 240 F. 2d 684. This construction is supported by the legislative history of the McGuire Act, carefully detailed in these opinions.

Plaintiff protests that our reading of the statute will allow the District of Columbia to impose its policies on economic activities in New York. But the opposite construction will simply allow New York to dominate the economic activities of the District of Columbia (and other like free trade areas). Since Congress has left the regulation of this part of interstate commerce to the option of the individual states, it is inevitable that when a single transaction affects states with conflicting policies one state or the other must see its policies slighted. We have no clearer guide in choosing the dominant state than the language of the statute itself. The trial judge attempted to weigh the defendant's contacts in New York against its contacts in the District, but this approach has no warrant in the congressional language or legislative history.[4] From all that appears Congress was concerned with the place where resales occurred, rather than the place where the

[4] Its weakness from a realistic point of view is highlighted by the fact that here more than two-thirds of defendant's sales were made over the counter in its extensive three-story store in the District, while the remaining or mail-order sales were by no means limited to New York customers; witness the two federal cases in Maryland that we have cited which also involve this defendant.

retailer's owner resided and exercised supervision over operations.

Nor do we think that advertisements and offers to sell are to be treated differently from sales themselves. The critical question is still the place of resale, and no enforcement action may be brought for advertising or offering goods for sale below fair trade prices unless the ad or offer contemplated resales in a fair trade jurisdiction. There is a practical advantage to having all three stages of the seamless process of merchandising governed by the same law, and the wording of the McGuire Act suggests that the three are to be handled together. This was the conclusion of Judge Watkins in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 140 F. Supp. 165, affirmed 4 Cir., 240 F. 2d 684, noted in 57 Col. L. Rev. 292; and we are in entire agreement with his comprehensive opinion. Hence an enforcement action under the New York statute is valid only if the resales occurred in New York.

The parties disagree as to whether the defendant's order blanks were offers or only advertisements soliciting offers. Plaintiff views them as offers which were accepted when consumers in New York signed them and put them in the mail. Defendant contends that the consumers' actions were the real offers which the defendant accepted in the District. We need not resolve the dispute, since Judge Waterman and I are agreed that the place where the contract was made is not controlling. In my view the place where title passed is critical.

The intent of the parties governs the passage of title between them, although statutes and case law provide guides for ascertaining such intent. Here the predominant

interest of both the seller and buyers was to take advantage of the absence of resale price maintenance legislation in the District of Columbia. The defendant's history and operations testify to its concern, and its various pieces of advertising brought home the same desire to New York consumers. For example, one of its order blanks announced "discounts on all the 'fair-traded' brands of merchandise that are being sold only at list price in 45 states." Since the parties had the power to determine for themselves where title would pass, they indubitably selected the District of Columbia, where their agreements would be enforceable, rather than New York, where they would not.

Where there is no contrary evidence, the fact that the seller pays the carrier suggests that title is intended to pass when the carrier delivers the goods to the buyer, Uniform Sales Act §19, Rule 5; but only slight evidence of a contrary intent rebuts the presumption of this rule. Williston, Sales §279b (Rev. Ed. 1948). Here the cost of transportation was being passed on to the mail order consumer in any event, so that little is to be inferred from the fact that the seller's catalogue price included the cost of transportation, instead of treating it as a separate item which the customer must also prepay. The customers' prepayment of the price is more evidence that title passed before the buyer received the goods. *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 2 Cir., 147 F. 2d 399, 402, certiorari denied 325 U. S. 861, and the vast bulk of mail order sales were thus prepaid.

But even the C.O.D. sales were made in the District of Columbia, we feel. C.O.D. customers, as well as customers who prepaid, placed their orders on blanks which proclaimed the advantages of sales in the District of Columbia;

and they, too, if asked, would have expressed a desire to pass title in a place where it was legal. Nor would the defendant be prejudiced by passing title before payment, for it could retain a seller's lien, entitling it to keep possession of the goods until paid. See *Rosiler v. Beeler Motor Co.*, 186 Okl. 88, 96 P. 2d 65. Defendant's failure to pay the District of Columbia sales tax is irrelevant to the intent of the parties, since this fact was never communicated to purchasers. Under the defendant's arrangement for doing business, title passed in the District of Columbia. *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 128 F. Supp. 457, 462; *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 140 F. Supp. 165, 174, affirmed 4 Cir., 240 F. 2d 684.

Quite apart from the McGuire Act, the same result is compelled by New York law. Sec. 369-b of New York's Feld-Crawford Act, N. Y. General Business Law,[5] cannot be distinguished from the Maryland Fair Trade Act, which the Court of Appeals for the Fourth Circuit recently construed. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, 4 Cir., 240 F. 2d 684. A unanimous court of appeals agreed with the two district judges earlier construing the Act that it covered only those advertisements and offers which referred to resales in Maryland. This narrow construction was adopted because the statute was in derogation of the common law and in

[5] "§369-b. *Unfair competition defined and made actionable*

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

posed a burden on interstate commerce—considerations which would weigh heavily with New York courts, as well, e.g., *General Electric Co.* v. *R. H. Macy & Co.*; 199 Misc. 87, 95-96, 103 N. Y. S. 2d 440, 449, appeal dismissed 278 App. Div. 939, 105 N. Y. S. 2d 1003.

Moreover, it seems apparent that New York would apply the substantive law of the District of Columbia to the facts of this case. Whether it regarded the place where title passes as critical (to keep the Feld-Crawford Act consistent with the McGuire Act) or saw the retailer's location as controlling, the result would be the same here. In an action for unfair competition by a manufacturer against a New York retailer engaged in direct-mail sales of fair-trade items to out-of-state consumers the New York courts have applied New York law without discussing our present problem. *Raxor Corp.* v. *Goody*, Sup., 121 N. Y. S. 2d 882, affirmed 282 App. Div. 921, 125 N. Y. S. 2d 643, affirmed 307 N. Y. 229, 120 N. E. 2d 802, certiorari denied *Goody* v. *Raxor Corp.*, 348 U. S. 863. The instant case is almost identical except that the retail store is located in the District of Columbia; and there is no reason to suspect that the New York courts, which have been scrupulous to apply principles of comity, would adopt a different conflicts rule here merely in order to govern all multi-state transactions by New York law, e.g., *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277, 194 N. E. 754; *Van Voorhis* v. *Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505. The fact that the defendant's owner is located in New York is as irrelevant under the Feld-Crawford Act as under the McGuire Act; the state judges will not distinguish between two mail order houses located in the District of Columbia solely because the owner of one resided in

New York and the owner of the other lived in Florida.[6] That construction would invite serious enforcement problems, since service of process on the Florida owner cannot be made in New York on the mere fact of advertisement in New York; and the courts of Forida might refuse to entertain actions for unfair competition under the Feld-Crawford Act on grounds of public policy. See Note, 57 Col. L. Rev. 292, 296.

My brother Watermaii criticizes use of the concept of title in determiaing the place of "resale" and suggests that we look instead to the situs of the retailer. The title approach seems required by the congressional language and the case law; in reality it adds precision to the statutory term by drawing upon precedents from the law of sales, e.g., *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C., supra*, D. C. D. Md., 140 F. Supp. 165, 172, note 12, where Judge Watkins relied on a state case involving passage of title in finding that the defendant's resales are made in the District of Columbia. I see no difficulty with this construction, but am convinced that the novel retailer-situs rule would introduce much uncertainty into the law. For example, it would be difficult to know how much paraphernalia a seller must have in a state to be "located" there. Similarly, it would be hard to fix the "location" of a large mail order house which has numerous warehouses and retail outlets in both free trade and fair trade states.

The criticisms of the construction here employed are two: that it facilitates evasion of fair trade regulation and

[6] Florida is one of the twelve states where resale price maintenance legislation has been declared invalid either in whole or in part by the state courts. See 1 CCH Trade Reg. Rep. ¶3,093; Sievert, "'Fair Trade' Tottering, But Hope Still Lingers," N. Y. World-Telegram and Sun, Feb. 22, 1957.

that it may create inconsistencies between the McGuire Act and the state fair trade laws. Obviously some manipulation is possible under both approaches. The one here adopted would permit no more latitude than the familiar doctrine that parties to a multi-state contract can agree as to which state's law will govern, provided the state selected has a direct and substantial relation to the transaction. *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403; 6 Corbin on Contracts §1509 (1951). Of course the parties, under well recognized principles set forth in more detail in the footnote, are limited in their choice of law as to the passage of title, and cannot elect to be governed by the law of some jurisdiction with which they have no connection.[7] Consequently any fear that New York retailers and consumers can subject local sales to foreign fair trade laws is groundless. Inasmuch as Judge Watkins has already read the title concept into the federal and Maryland

[7] "[T]he parties may elect between the different systems of law, which the law would construe as competing systems; but they cannot elect the law of any other jurisdiction." 6 Page, Law of Contracts §3571. "The courts have * * * generally confined the parties in their choice of law either to the law of the place of making or to the law of the place of performance." 2 Beale, Conflict of Laws 1081. "It is almost universally held that the parties, in exercising the power to select the jurisdiction whose law they intend to have control the obligations, rights, and duties under their contract, must act in good faith and with no purpose of evasion or of avoiding some provision of the law of the place of making." *Owens* v. *Hagenbeck-Wallace Shows Co.*, 58 R. I. 162, 192 A. 158, 164. See also *E. Gerli & Co.* v. *Cunard S.S. Co.*, 2 Cir., 48 F. 2d 115, *Brierley* v. *Commercial Credit Co.*, 3 Cir., 43 F. 2d 730, certiorari denied 282 U. S. 897; *Palmer* v. *Chamberlin*, 5 Cir., 191 F. 2d 532, 536, 27 A. L. R. 2d 416; *Duskin* v. *Pennsylvania-Central Airlines Corp.*, 6 Cir., 167 F. 2d 727, 730, certiorari denied *Pennsylvania-Central Airlines* v. *Duskin*, 335 U. S. 827; *In re Sil's Estate*, 205 Misc. 715, 129 N. Y. S. 2d 134; Annotation, Validity and effect of stipulation in contract to the effect that it shall be governed by the law of a particular state which is neither the place where the contract is made nor the place where it is to be performed, 112 A. L. R. 124

statutes in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, *supra*, D. C. D. Md., 140 F. Supp. 165, and the only possibly contrary authority is *Razor Corp* v. *Goody*, *supra*, where the law of the forum was applied without discussion, it seems most likely that uniformity will come about as the state courts read the title concept into their statutes to make them agree with the federal act from which their validity is derived. Congressional disapproval of *Sunbeam Corp.* v. *Wentling*, 3 Cir., 185 F. 2d 903, vacated 341 U. S. 944, does not bear on the present controversy nor does it lend support to the retailer-situs construction.

Because Judge Frank died before casting his final vote, his views on this case are not official; but it is reassuring that his memorandum and tentative vote agreed so closely with the views I have expressed in calling for reversal on both state and federal grounds and in suggesting that we might reverse on the "persuasive and exhaustive" district court opinions in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, *supra*, D. C. D. Md., 140 F. Supp. 165, and *Revere Camera Co.* v. *Masters Mail Order Co. of Washington, D. C.*, *supra*, D. C. D. Md., 128 F. Supp. 457. In accordance with those views the order of injunction must be reversed and the action must be dismissed on the merits.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result reached by Judge Clark. With him I hold that New York's Feld Crawford Act is unenforceable against Masters Mail Order Company of Wash-

ington, D. C., Inc., the defendant here. Masters is located in the District of Columbia where there is no resale price maintenance statute, law, or public policy. The prices Masters receives for goods sold by it to New York purchasers, being goods shipped in interstate commerce, are, I believe, governed by the public policy of the District of Columbia, the state where Masters is located. That policy permits free-pricing. The public policy of New York that restrains free-pricing in favor of agreements of resale price maintenance I hold is inapplicable to retail transactions of sale made in interstate commerce by this District of Columbia retailer; for I believe that for the purposes of the McGuire Act, 15 U. S. C. A. §45(a) (1952), all such sales take place in the District of Columbia. I reach this conclusion from my reading of the McGuire Act and my understanding of the intent of Congress in passing that legislation. Hence, although Judge Clark and I agree in reversing the lower court, I differ somewhat from him in reaching that decision.

In enacting the McGuire Act, 15 U. S. C. A. §45(a) (1952), the Congress indicated its intention to leave the adoption or rejection of resale price maintenance to the individual states. The states' rights basis of this legislation clearly appears in the preamble of the Act:

> "That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose

of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

To carry out this purpose, the McGuire Act provides that the applicable state law shall be that "* * * in effect in any State, Territory, or the District of Columbia in which such resale is to be made * * *" I think we must interpret this language in a way that will most effectively implement the intent of Congress to permit the individual states to adopt or reject "fair-trade" laws and then to enforce those laws in the event of their adoption. We should not interpret the language to permit the policy of more than one state to affect the transaction of sale; or to permit parties to the sale to "contract out" of the applicable state law or to "pick a state law" to suit their convenience. Since the place of resale is not defined by the Act, if we construe that phrase to mean the place where the seller of the goods is located, we obtain the certainty we seek consistent with the intent of Congress to preserve the rights of individual states to regulate in this field; and we do so by an interpretation clearly reasonable from the language of the Act.

I find support for my position in the legislative history of the McGuire Act. During the debates in Congress preceding its enactment, Congressman Cole of Kansas offered an amendment allegedly designed to protect retailers located in fair trade states from competition from outside those states, and to prevent, "raids on the part of mail order houses and cut rate retailers and wholesalers in non-fair-trade states." 98 Cong. Rec. 4952 (1952). That amendment, insofar as here relevant, provided:

"Whenever by contract or agreement described in subsection (2) a stipulated or minimum resale price may be established for a commodity in any State, Territory, or the District of Columbia, where such a contract or agreement is lawful, it shall be an act of unfair competition actionable at the suit of any person damaged thereby, to wilfully and knowingly, in interstate commerce (1) sell or (2) have transported for sale or resale or (3) *deliver pursuant to a sale, or otherwise deliver*, such commodity in any such State, Territory, or the District of Columbia, where such a contract or agreement is lawful, at less than the price or prices so established in such contract or agreement." 98 Cong. Rec. 4952 (1952) (Emphasis added.)

This amendment was vigorously opposed by Congressman Patman of Texas, who pointed out that a retailer located in a free-pricing jurisdiction like Texas would be prevented from selling to nearby customers who resided in a fair-trade state at less than the fair-trade prices maintained in the latter jurisdiction. 98 Cong. Rec. 4958 (1952). Such interference with the pricing policy of a retailer located in a free-pricing jurisdiction would be "entirely contrary to the [States' right] concept we have in advocating the McGuire bill." The Cole Amendment, he pointed out, would place "a burden upon the merchants in those States where they have no fair-trade law."

The Cole Amendment was rejected by the House of Representatives, which passed the McGuire Act in its present form. 98 Cong. Rec. 4956 (1952). However, in addition to criticism such as that of Congressman Patman, many Congressmen apparently opposed the Cole Amendment because it created a federal cause of action. See, *e.g.*, remarks of Congressman Harris, of Arkansas, 98 Cong. Rec.

4954 (1952). Hence the defeat of that Amendment can be explained on several grounds. Nevertheless, the absence of the controversial phrase, "(3) *deliver pursuant to a sale, or otherwise deliver*," quoted above, is support for my belief that the Congress intended that a retailer should be governed only by the fair-trade law of the jurisdiction in which he is located.[1]

I also find authority for my position in court decisions. Prior to the passage of the McGuire Act, the Third Circuit had held that a resale by a retail mail order house located in Pennsylvania was not exempt from the Sherman Act, and therefore not within the reach of the Pennsylvania fair-trade law, if the resale was to a customer residing outside Pennsylvania. *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903 (3d Cir. 1950). When Congress created the McGuire Act, it indicated that one of its express purposes was to "overrule" the *Wentling* decision, and to permit the individual states to apply their fair-trade laws to interstate shipments such as those involved in *Wentling*. See H. R. Rep. 1437, 82d Cong., 2d Sess. 6 (1952). And subsequent to the passage of the McGuire Act several courts have held that interstate shipments are within the reach of the fair-trade law of the state where the seller is located, thereby implying that the resale contemplated by the McGuire Act takes place in that state. See, e.g., *General Electric Co.* v. *Masters, Inc.* (*Razor Corp.* v. *Goodij*), 307 N. Y. 229, 120

[1] This phrase was separable from the provisions of the Cole Amendment providing for a federal cause of action. Being so separable, it could easily have been inserted in the McGuire Act which leaves enforcement to the several states. It is a fair conclusion, therefore, that in situations where the transaction is in interstate commerce Congress did not intend to permit the state in which the goods are delivered to be able to enforce its local resale price maintenance statute.

N. E. 2d 802 (1954); *cert. denied*, 348 U. S. 863; *Sunbeam Corp. v. MacMillan*, 110 F. Supp. 836 (D. Md. 1953).

To also permit the state of ultimate destination where the consumer resides to apply its fair-trade law to such interstate transactions as those now before us would logically require a holding that under the McGuire Act a resale can take place in *two* jurisdictions. It is my belief that the Congress did not intend that New York State can enforce its Feld-Crawford Act both against resident sellers, as has been done in *Baror Corp. v. Goody*, and also against a non-resident seller as by the decision below. For such an anomalous result I find no authority in the language or history of the McGuire Act. In fact, its somewhat equivocal legislative history tends to support the opposite conclusion, that the seller is subject to the applicable law of but one state. See 98 Cong. Rec. 4952-54 (1952); *Revere Camera Co. v. Masters Mail Order Co.*, 128 F. Supp. 457, 463 (D. Md. 1955); *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 440 F. Supp. 165, 170-78 (D. Md. 1956), *aff'd*, 240 F. 2d 684 (4th Cir. 1957).

In view of my understanding of the McGuire Act, I do not find that the New York Feld-Crawford Act has any applicability to the situation before us here. Congress, in passing the McGuire Act, exempted resale price maintenance agreements from the coverage of the federal anti-trust laws by permitting the individual states to enact fair-trade legislation. But that exemption can be availed of only by the state that the McGuire Act designates as the state of resale, *i.e.*, the state where the retailer is located. Hence the New York Feld-Crawford Act, in my judgment, cannot be enforced against this defendant, located in the District of Columbia, on the facts in this case; and, as

pointed out by Judge Clark, the fact that the defendant is owned by a resident of New York State does not make that Act any more applicable to it than if the defendant were owned by a resident of some other state.

And I agree with Judge Clark that the New York contacts of the defendant stressed by the trial court also are irrelevant to our problem of construing the McGuire Act. Nor do I see any reason for treating the defendant as a mere dummy corporation for its New York parent. The defendant conducts an extensive retail business in Washington and must be regarded as a separate corporate entity, selling the plaintiff's merchandise in that jurisdiction.

Judge Clark interprets the language of the McGuire Act to make the resale price maintenance statute, if any, of the state where the title passes to goods sold in interstate commerce the only state statute applicable to the transaction. Such an interpretation of that Act permits sellers and buyers to "pick their own law," despite the law of the state where one or both of them may be located.

Clearly a sale or contract of sale can be made in one place and passage of title to the goods being sold may occur elsewhere. Moreover, the place where, or the time when, the title passes can be arranged at the will of the parties. Thus under the approach adopted by Judge Clark it would be possible, despite *Rayor* v. *Goody*, *supra*, for a seller located in a fair-trade jurisdiction to avoid the application of the fair-trade law of that state by arranging for title to pass in a non-fair-trade jurisdiction where the buyer was located. Or by agreement of the parties, even though both seller and buyer reside in the same or in different fair-trade jurisdictions, title to the goods being sold can be arranged to pass in a free pricing jurisdiction

if the jurisdiction chosen has a direct and substantial relation to the transaction.

Judge Clark would point out that if my interpretation of the McGuire Act is adopted it will be difficult in future cases "to know how much paraphernalia a seller must have in a state to be 'located' there." Surely, realistic criteria for determining the location of a retailer will logically develop as the future cases may require that development. I would here hold only that *this* defendant-retailer is located within the District of Columbia and therefore beyond the reach of the fair trade law of New York. That is the issue before us to decide.

LUMBARD, *Circuit Judge* (dissenting):

I dissent for the reasons so well stated by Judge Bicks below, 145 F. Supp. 57 (S. D. N. Y. 1956). The sales complained of took place in New York and New York may prohibit them. Accordingly the district court had the power and the duty to enjoin these New York sales, offers to sell and advertising.

Masters, Inc. of New York has frequently been before the New York courts for violation of the Feld-Crawford Act. In 1952, Masters, Inc. was enjoined from selling General Electric appliances below fair-traded prices, 122 N. Y. S. 2d 14 (Sup. Ct. N. Y. 1952); and in 1953 was fined twice for violating the injunction. Not long thereafter, it set up in the District of Columbia (the nearest Metropolitan area without Fair Trade laws) a store which was separately incorporated, although wholly owned and controlled by Masters, Inc.

Despite the formal corporate separation, Masters, Inc. used the facilities of both the New York and Washington stores to exploit the New York market.[1] Thus, Masters, Inc. widely advertised that although it could not sell General Electric appliances at its New York store, it could and would sell them by mail order from Washington, D. C. When customers sought to buy the appliance at the New York store, they were again informed that the appliances could be obtained at the Washington store and order blanks were provided in New York; moreover the advertising mailed by Masters Mail Order of Washington, D. C., although posted in Washington, was prepared in New York from the mailing lists and other facilities of the New York office.

"It seems to me that it would be difficult to imagine a clearer case of evasion of the New York law. Regardless of how we ought to treat the wholly independent out-of-state mail order house, it seems to me, with all due deference to my brethren, that that is not the case before us. Insofar as the sales in question are concerned, the many contacts with New York establish that for all practical purposes the Masters organization is in the same position as a New York seller with an out-of-state warehouse and office staff. If we ignore that and look only to such easily arranged formalities as separate incorporation, title passage and where the article is mailed, we merely facilitate the emasculation of fair trade by any discount house large

[1] Masters Mail Order of Washington, D. C. did most of its business in across the counter sales, but I think that that is immaterial to the issues before us since our concern is only with the substantial mail-order sales to the New York market.

enough to be able to afford such arrangements.[2] These formalities may be material in other contexts, but they should not be given controlling significance here.

We must not forget that Congress has twice indicated—the second time despite strong opposition—that the states are to be allowed to prevent price-competition among those selling branded products in the home market. See H. R. Rep. No. 1516, 82d Cong. 2d Sess. (1952). This was to avoid damage to the good will of the manufacturer in the eyes of local consumers and to protect local small businessmen against the price-cutting powers of the large firms. See *id.* at 12, 10. The defendant's activities have frustrated and will continue to frustrate both purposes in the New York market unless they are enjoined.[3]

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[2] Stress on title passage seems to me to be particularly unfortunate, for that would allow even a wholly in-state retailer to evade his state's fair trade law when selling to an out-of-state consumer by merely arranging that title pass in a free-trade state with some relevant contacts.

[3] *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co. of Washington, D. C.*, 140 F. Supp. 165 (D. C. Md. 1956), aff'd 240 F. 2d 684 (4 Cir. 1957) does not seem to me to be persuasive authority for a contrary result as to the McGuire Act since that dealt primarily with the Maryland statute. Nor is the decision of much assistance in construing the Feld-Crawford Act, for despite the similarity of language between the Maryland and New York acts, the New York legislature and the New York courts have already firmly indicated an intent to protect the home market as much as possible. See *Kavar Corp.* v. *Goody*, 307 N. Y. 229 (1954), cert. denied, 348 U. S. 863 (1954) and *Eastman Kodak Co.* v. *Masters, Inc.*, 153 N. Y. S. 2d 433 (Sup. Ct. N. Y. 1956). Moreover, in *Bissell* we do not have the many contacts by the seller with the fair trade state which make the transactions before us sales in New York for all practical purposes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 224

GENERAL ELECTRIC COMPANY, *Petitioner*

v.

MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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GENERAL ELECTRIC COMPANY, *Petitioner*

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MASTERS MAIL ORDER COMPANY OF WASHINGTON, D. C., INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTORY STATEMENT

This case concerns the right of respondent, a vendor located in the District of Columbia, a non-fair trade jurisdiction, to make interstate mail order sales and to advertise, at less than fair trade prices, to customers in fair trade states. Specifically, petitioner asserts that its resale price-fixing agreements signed by New York vendors, pursuant to New York's Fair Trade Law, are binding upon respondent, a "non-signer", in its transactions with New Yorkers. The decision below held otherwise, on the primary ground

that with respect to such transactions, the McGuire Act, outlined below, did not interdict the Sherman Act's ban against price-fixing agreements.

STATUTES INVOLVED

The statutes involved are the New York Fair Trade Law, known as the Feld-Crawford Act (New York General Business Law, § 369-a to 369-e, inclusive) and the amendment to Section 5 of the Federal Trade Commission Act, known as the McGuire Act (66 Stat. 632, 15 U.S.C. § 45(a)(1)-(5), inclusive). They are respectively set forth in complete text at pages 25-27 and 22-24 of the Appendix to the Petition for Certiorari (hereafter Pet. —) and therefore will not be reproduced here in full.

So far as material these statutes provide as follows:

(i) *Feld Crawford Act*

§ *369-a:* "No contract relating to the sale or resale of a [trademarked] commodity . . . shall be deemed in violation of any law of the State of New York by reason of . . . provisions . . . [t]hat the buyer will not resell . . . except at the price stipulated by the vendor; . . ."

§ *369-b:* "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

(ii) *McGuire Act*

Subsection 5(a)(2): That the federal Antitrust Acts do not prohibit "contracts or agreements pre-

scribing minimum or stipulated prices . . . for the resale of a [trademarked] commodity . . . when . . . lawful as applied to intrastate transactions under any statute . . . in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale."

Subsection 5(a)(3): That the federal Antitrust Acts do not forbid "the exercise . . . of any right or right of action created by . . . any State [against] willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in *such* contracts or agreements . . ."

Subsection 5(a)(4): That "[n]either the making of contracts or agreements *as described in paragraph (2) of this subsection,* nor the exercise or enforcement of any right or right of action *as described in paragraph (3) of this subsection* shall constitute an unlawful burden or restraint upon, or interference with, commerce" (emphasis supplied).

THE OPINIONS BELOW

The opinion of the District Court is reported in 145 F. Supp. at 57-64. That Court ruled that respondent was subject to the New York Fair Trade Act in selling and advertising to New Yorkers because of its "contacts" with New York, principally its ownership by, and common management with, a New York corporation.

The Court of Appeals for the Second Circuit reversed the trial court, with one judge dissenting. It held that petitioner's New York agreements did not cover respondent's interstate sales to New York customers or advertising pertaining thereto, because the McGuire Act validated state-authorized price-fixing

contracts only as to "resales" occurring in a fair trade state, whereas respondent's "resales", within the meaning of the federal law, occurred in the District of Columbia, a free jurisdiction (Pet. 32-33, 35, 41-42).

The two majority judges agreed that respondent was engaged in the bona fide conduct of an "extensive" retail business in the District of Columbia (*id.* at 34 n. 4, 47). They likewise concurred that respondent's New York "contacts", invoked by the trial court and the dissenting appellate judge as a basis for subjecting its dealings with New Yorkers to fair trade control, were immaterial for purposes of the McGuire Act (*id.* at 34-35, 46-47).

There was one difference in rationale between the majority judges. This concerned the meaning of the reference to the "resale" jurisdiction in subsection 2 of the McGuire Act. Chief Judge Clark felt that in applying this standard, "the place where title passed is critical", provided it "has a direct and substantial relation to the transaction" (*id.* at 35, 40). Judge Waterman considered that Congress intended the reference "to mean the place where the seller of the goods is located" (*id.* at 42, 45).

The Chief Judge further ruled that "[q]uite apart from the McGuire Act, the same result is compelled by New York law" (*id.* at 37), whether New York "regarded the place where title passes as critical . . . or saw the retailer's location as controlling" (*id.* at 38). The concurring opinion stated that "[i]n view of [the author's] understanding of the McGuire Act, [he did] not find that the New York Feld-Crawford Act has any applicability to the situation before us here" (*id.* at 46).

The dissenting judge below adopted the trial court's view that respondent's sales occurred in New York because of its New York "contacts", notably its ownership by a New York corporation, and that it therefore was governed by New York fair trade requirements (*id.* at 48-50).

QUESTIONS PRESENTED

So far as the decision below treated the issues, the questions involved are these:

1. Is the operator of a retail store located in the District of Columbia, where there is no fair trade law, required by the McGuire Act to comply with the terms of price-fixing agreements, effected under New York law, in determining the prices he will charge and advertise to New Yorkers for goods purchased by interstate mail orders received, accepted and filled in the District of Columbia?

2. Does the New York Fair Trade law itself cover such transactions?

The following additional questions were raised below but were not treated by the decision:

(a) Is such an application of the New York Fair Trade Act barred by Article I, Section 8, Clause 17, of the Constitution of the United States, vesting exclusive legislative power over the District of Columbia in the Congress of the United States, and the Supremacy Clause, Article VI, Clause 2, of that Constitution?

(b) In any event, is such extraterritorial application of the New York statute barred by the Commerce Clause, Article I, Section 8, Clause 3, of the Constitu-

tion of the United States and by the Due Process Clauses of the Fifth and Fourteenth Amendments to that Constitution?

COUNTER-STATEMENT OF THE CASE

The case was tried exclusively on stipulated evidence establishing the following undisputed facts:

1. Respondent has only one business establishment. This is a retail store in Washington, D. C., consisting of a basement, main floor and two upper stories. It was opened in March 1954. The store has a fulltime staff of employees, including a supervisor. It carries an inventory of goods, including those of petitioner General Electric (GE), which is available for sale both over-the-counter and by mail. In fact more than two-thirds of respondent's sales are made to over-the-counter customers. (R(I) 25-26; ¶¶ 13, 17, 19).[1]

2. When this action was filed, in May 1954, respondent was a Maryland corporation. As of October 18, 1954, before trial of this case, that corporation was dissolved and was succeeded by a District of Columbia corporation of the same name. The reincorporation was undertaken in June 1954, after Congress, in that same month, had passed a modern corporation law for the District of Columbia. Respondent is wholly-owned by Masters, Inc., a New York retailer. (R(I) 24-25; ¶¶ 10, 12).

3. Respondent acquired GE products in part from its parent, but principally from GE's franchised dis-

[1] The record in this Court includes Appellants' (Masters') Appendix below, designated as Volume I in the certified Record and hereafter referred to as R(I) —, and Appellee's (GE's) Appendix below, designated as Volume II and hereafter referred to as R(II) —.

tributors in the District of Columbia, including General Electric Distributing Corporation, a wholly-owned subsidiary of GE (R(I) 26; 31; ¶¶ 18, 43).

4. GE's fair trade agreements provide (R(I) 40, 42):

> "Not for use in the District of Columbia or in the States of Florida, Missouri or Texas
>
> * * *
>
> This agreement shall not apply to sales made in any state in which the resale price control herein provided for is not lawful under any applicable Fair Trade Act or other statute, or rule of law or public policy."

There is no evidence of any fair trade agreement between GE and respondent or its parent.

5. In the course of the operation of the Washington store, respondent, knowing of the existence of GE's fair trade agreements, made sales by mail of GE merchandise to consumers in ten fair trade states at prices below those fixed in GE's fair trade contracts (R(I) 25-26, 31-32; ¶¶ 15, 20, 21, 45). These sales were all made pursuant to mail orders received at respondent's place of business in the District of Columbia directly from the consumers. The orders were all filled by shipments of the goods, in original factory cartons, directly to the consumers from the District of Columbia, either by mail or express. Some of such sales were made on a C.O.D. basis, but the great majority were effected pursuant to prepaid orders. In all cases respondent paid the mailing or shipping costs. (R(I) 25, 32; ¶¶ 16, 46).

6. Respondent's mail order forms, stating the terms of the sale transactions, (i) recited: "This order is

subject to acceptance by Masters Mail Order Company in, Washington, D. C."; (ii) advised: "All prices subject to change without notice"; (iii) expressed the customer's direction in these terms: "Please ship me the following merchandise"; (iv) bore the notation: "Sold To" immediately in front of the customer's name; and (v) provided that the vendor "allows you thirty days to exchange or refund your purchase by merely returning it in its original condition and carton." (R(I) 10, 32; ¶¶ 46, 47; see, e.g., R(II) 1, 3, 5, 8, 10, 13, 16, 19, 21; Exs. B, C, D, H, I, K, M, O, P). At least five such refunds have been made (R(I) 32-33; ¶ 48).

7. Respondent advertised in fair trade states through mailing pieces sent to prospective customers from the District of Columbia (R(I) 28-31; ¶¶ 29-33, 35, 39, 40).

8. Masters, Inc., (respondent's parent) furnished copies of respondent's mail order blanks only to consumers who sought, either in person or by mail, to buy GE appliances at the New York store of Masters, Inc., below fair trade prices. In such cases Masters, Inc. explained that such sales were illegal in New York, but could be effected by mail with respondent in Washington. In the case of mail orders of this kind, Masters, Inc. made a similar explanation and returned the prepayment, if any, to the customer. Masters, Inc. also furnished respondent's mail order forms to persons who specifically requested them. (R(I) 29-30, 34-37, 43; ¶¶ 35-38, 52-55, inclusive, Ex. F. R(II) 7, 24, 26; Exs. E, X, Y).

9. New York was the locale of respondent's parent corporation and top management (R(I) 26, 27, 28;

¶¶ 22, 23, 27, 28); of the smaller part of its purchases of respondent's products (R(I) 26, 31; ¶¶ 18, 43); of the preparation of its advertising materials, which usually were paid for in the first instance by respondent's parent and subsequently charged to respondent (R(I) 28-29, 30-31; ¶¶ 29-34, 39, 40); and of the procurement of its mailing lists (R(I) 29, ¶¶ 31-32). Respondent's checks, drawn on its bank account in the District of Columbia, were signed by its president, who was also the president of its parent (R(I) 27-28; ¶ 26). Respondent's local supervisor in Washington, D. C. had discretion in effectuating the policies adopted by his superiors (R(I) 28; ¶ 28).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the decision below was clearly correct; raises no questions of sufficient importance to warrant review by the Court; is in harmony with the result unanimously reached by the only other Court of Appeals which has considered the same problem; and is in accord with the legislative policy of Congress towards the District of Columbia.

1. The Majority Below Correctly Applied the McGuire Act and the Case Presents No Question Calling for Adjudication by This Court.

The critical provision of the McGuire Act, to which the succeeding sections refer back, is its subsection 5(a)(2), 66 Stat. 632, 15 U.S.C. § 45(a)(2). This lifts the interdiction of the federal antitrust laws from "contracts or agreements prescribing minimum or stipulated prices . . . for the resale of a commodity . . . when . . . lawful as applied to *intrastate* transactions under any statute. . . in effect in any State,

Territory, or the District of Columbia *in which such resale is to be made, or to which the commodity is to be transported for such resale*" (emphasis supplied). As its text thus is plain, subsection 5(a)(2) does not lift the ban of the antitrust laws unless the contract or agreement pertains to a "resale" of the described type—i.e., one which occurs in a state with a fair trade law.

The limited exemption thus granted by subsection 5(a)(2) is not extended in any manner by the succeeding provisions. Thus it is only as to "*such* contracts or agreements"—i.e., those described in the preceding subsection 5(a)(2)—that the succeeding subsection 5(a)(3) authorizes pursuit of state remedies for advertising, offering, or selling below the fixed prices. Pursuant to subsection 5(a)(2), "*such* contracts" are immunized from the Sherman Act only insofar as they cover a "resale" in a fair-trade state. Hence, by the express terms of subsection 5(a)(3), the federal sanction of state-created remedies, for enforcement of "such contracts", is likewise effective only where the challenged activities concern a "resale" in a price-fixed jurisdiction. In other words, the enforcement privilege is not granted unless the pertinent "resale" is of that character.

The same limitation is inherent in subsection 5(a)(4). It yields the federal supremacy over interstate commerce only for "contracts or agreements *as described in paragraph (2) of this subsection*" and for the enforcement of remedies "*as described in paragraph (3) of this subsection*" (emphasis supplied). Hence 5(a)(4) does not expand the permissible reach of state law beyond the limits stipulated by the preceding provisions.

It follows that if respondent's interstate mail order activities involve "resales" in the District of Columbia, a competitive price jurisdiction, the McGuire Act bars petitioner from exerting price control over those activities. On this record it is clear that District of Columbia resales are involved and that, in any event, the petition presents no question appropriate for review here.

More particularly, the majority below agreed that respondent conducts a *bona fide*, extensive retail business in the District of Columbia (Pet. 34 n. 4; 47), and this fact was not challenged by the dissent (*id.* p. 49 n. 1). Nor did either of the other judges express any disagreement with Judge Clark's view that in making "resales" to New Yorkers, respondent passed title to the subject goods in the District of Columbia. In such circumstances, respondent's challenged activities are beyond petitioner's reach, if there is any force at all in the McGuire Act's limitation of the scope of fair trade agreements to resales in fair trade states.[2]

Apart from the merits, the case presents no question calling for the exercise of certiorari jurisdiction. So far as this respondent is concerned, the divergence in rationale between the majority judges involves a dialectical difference, not a decisional division. Both in reality rested decision on the same fundamental fact—that respondent conducted its business in a *bona fide* District of Columbia retail establishment. That fact underlay Chief Judge Clark's ruling for respondent, since he related the title-passing criterion to a place

[2] The legislative history supports the decision below, as the concurring judge noted (Pet. 43-45). See also *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, 140 F. Supp. 165, 175-178 (D. Md. 1956), *aff'd* 240 F. 2d 684.

which "has a direct and substantial relation to the transaction" (Pet. 40). That same fact was necessarily decisive under Judge Waterman's hypothesis that the statutory issue turned on the "place where the seller of the goods is located" (*id.* at 43). Only through reversal of the conclusion that title passed in the District of Columbia would the analytical difference between the majority below assume decisional significance. An inquiry into that subject is not worthy of this Court's attention.

Neither is any generic issue, meriting this Court's consideration, projected by the minority view—that respondent's New York "'contacts'" subjected it to petitioner's price fixing agreements (Pet. 48-50). As shown by the dissenting opinion, the "contacts" in question all simmer down to the basic circumstance that this particular respondent is a subsidiary of a particular New York concern, enjoying certain business relations with its parent, rather than a "wholly independent out-of-state mail order house" (Pet. 49). Since the "contacts" rationale is based on facts peculiar to this litigant, its review by this Court would resolve no question of general importance.

The prevailing judges below were correct in their joint conclusion that the "contacts" theory was beside the point (Pet. 34-35, 46-47). As they perceived, nothing in the McGuire Act, or its history, indicates a Congressional design to define the statutory reference to the place of "resale" in terms of such extrinsic matters as the vendor's corporate affiliations; or the residence of its officers; or the locale of its ancillary promotional activities in procuring mailing lists and printing advertising matter.

Furthermore, the adoption of the "contacts" theory would lead to a highly uneven and unpredictable application of the McGuire Act. On that basis, its impact might vary among neighboring retailers in the same competitive price jurisdiction, selling the same merchandise on identical terms, simply because of differences in their auxiliary operations or in their ownership characteristics. For example, the Best or Franklin Simon stores in the District of Columbia, being owned by New York concerns, might have different statutory responsibilities than would S. Kann Sons Co. or Woodward & Lothrop, as locally owned Washington retailers. And Garfinckel's, a locally owned store with New York subsidiaries, might fit into still another category. The point here is that the McGuire Act is framed in terms of the place of sale—not the seller's personality.

2. The Courts of Appeals are in Harmony on the Matters in Issue.

There is only one other Court of Appeals case in point. It was there unanimously held that this same respondent was not subject to Maryland's fair trade law, identical with New York's, in respect of its mail order business with Maryland residents. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, 240 F. 2d 684 (4th Cir. 1957). That opinion, like Judge Clark's opinion below (Pet. 32), emphasized the admonition of this Court, in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956), that the McGuire Act's loosening of the Sherman Act's price-fixing bar "must be construed strictly since resale price maintenance is a privilege restrictive of a free economy" (240 F. 2d at 689).

3. The Decision Below is in Accord With the Legislative Policy of Congress Towards the District of Columbia.

The impropriety of subjecting respondent's challenged activities to fair trade control is evident from Congress' repeated rejection of proposals to enact a resale price maintenance law for the District of Columbia. At least seven such bills have been introduced, three of them since the passage of the McGuire Act.[3] All have been rejected, and latterly in the face of the plea of fair trade proponents "that mail order houses were using the District of Columbia as a haven of refuge from which to invade the fair-trade states" (*Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 140 F. Supp. 165, 178 (D. Md. 1956),[4] affirmed 240 F. 2d 684 (4th Cir. 1957)).

The foregoing history evinces a conscious Congressional purpose to allow full sway to the Sherman Act in the District of Columbia and reinforces the lower court's ruling that the McGuire Act forecloses fair trade interference with respondent's interstate mail order business. That statute necessarily controls this case, however far the states may attempt to stretch their statutes. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme,

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[3] H.R. 8175, 75th Cong., 1st Sess. (1937); H.R. 9873, 75th Cong., 3d Sess. (1938); H.R. 3838, 76th Cong., 1st Sess. (1939); S. 1417, 78th Cong., 1st Sess. (1945); S. 3297 and H.R. 8591, 83rd Cong., 2d Sess. (1954); S. 270, 84th Cong., 1st Sess. (1955).

[4] The evident reference was to Hearings, Senate Committee on the District of Columbia, on S. 3297, 83d Cong., 2d Sess., and particularly to the statement of the General Counsel of the Sunbeam Corporation, a leading fair trade manufacturer. See, e.g., *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903 (3d Cir. 1950); *Sunbeam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31 (N.D. Cal. 1953).

absent approval by Congress" (*Schwegmann Bros.* v. *Calvert Distillers Corp.* 341 U.S. 384, 386 (1951)).[5]

The requisite Congressional approval is lacking as to District of Columbia vendors. Consequently, if petitioner's agreements were applied here, respondent "would be required to conduct its business under compulsion, and by virtue of contracts to which it is not and could not legally be a party, in a manner it could not voluntarily and directly contract to do" (*Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co., supra*, 140 F. Supp. at 174).

"In this setting, moreover, there is a special constitutional barrier against subjection of the instant transactions to price fixing agreements resting on New York law. This is Article I, Section 8, clause 17 of the federal Constitution, whereby Congress is invested with exclusive legislative power over the District of Columbia. Compare *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U.S. 285 (1943).

4. There Is No Conflict With New York Law.

There is no substance in petitioner's suggestion that the decision below is opposed to *Raxor Corp.* v. *Goody*, 307 N.Y. 229, 120 N.E. 2d 802 (1954). The question there was whether New York's fair trade requirements could be applied to out-of-state mail order sales by a local vendor. This was the opposite situation from the one at bar. Citing as its sole authority the ruling of Judge Chesnut in *Sunbeam Corp.* v. *Mac-*

[5] As an exception to the Sherman Act, the McGuire Act is not to be extended "by implication" (*United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and is effective only to the extent that there is a "clear repugnancy" between the two laws (*State of Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 457 (1945)).

Millan, 110 F. Supp. 836 (D. Md. 1953), that the McGuire Act permitted Maryland to regulate the "export" mail order sales of resident merchants, the New York Court sustained similar coverage. 307 N.Y. at 240, 120 N.E. 2d at 805-806. But that holding does not reach this case, as is indicated by the subsequent opinion of Judge Chesnut in *Revere Camera Co.* v. *Masters Mail Order Co.* (this respondent), 128 F. Supp. 457 (D. Md. 1955), involving the same activities challenged here. He there pointed out that the *MacMillan* decision did not govern "the factual situation presented in the instant case with respect to the sale of goods from Washington into Maryland" (128 F. Supp. at 462). That the New York Court of Appeals would itself recognize the same distinction is indicated by its holding in *People ex rel. Kirkman* v. *Amringe*, 266 N.Y. 277, 194 N.E. 754 (1935).

Neither is there any force in the claim that conflict with New York law is occasioned by the holding below that the McGuire Act authorizes enforcement action against discount advertising only when related to a resale in a fair trade state (Pet. 11). The contention here is that respondent's advertising was unlawful "whether or not the sales were actually consummated in New York" (Pet. 11). The supporting argument is that this construction is compelled by the Feld-Crawford Act's "use of the disjunctive ('advertising, offering for sale *or* selling') in the statutory language" (*ibid.*).

The short answer lies in the following disclaimer incorporated in petitioner's form of fair trade agreement (R. 42; Ex. Z):

> "This agreement shall not apply to sales made in any state in which the resale price control herein

> provided for is not lawful under any applicable Fair Trade Act or other statute, or rule of law or public policy."

It follows that if respondent's sales were "'consummated" in the District of Columbia, there was no applicable resale price agreement, and thus no governing fair trade prices, regardless of the scope of the New York statute's advertising coverage. That statute is not mandatory or self-executing. It can be brought into play only by the effectuation of a fair trade agreement.

Next, whether or not New York law accords independent force to the references to "advertising, offering for sale or selling", the Court below correctly held that "the wording of the McGuire Act suggests that the three are to be handled together" (Pet. 35). For as we have shown, p. 10, *supra*, state remedies against discount advertising and offers are sanctioned by the McGuire Act only insofar as they enforce agreements governing "resales" in a fair trade jurisdiction. This authorization does not permit a fair trade state or its courts to interfere with advertising or offers pertaining to resales in free jurisdictions. The "local-dissemination" of advertising concerned with interstate sales is of itself commerce within the meaning of the Sherman Act. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 151 (1951). "Where compliance with the injunction of the state court would result in the restraint of trade interdicted by the Sherman Act, the injunction must be vacated in keeping with the Supremacy Clause of the United States Constitution . . . It goes without saying that a continuing injunction commanding adherence to a price-maintenance arrangement in violation of the

Sherman Act has no legal force or vitality" (*Johnson & Johnson* v. *Weissbard*, 11 N.J. 552, 556, 95 A. 2d 403, 405-406 (Sup. Ct. 1953)).

Actually petitioner's instant argument overlooks the full text of the Feld-Crawford Act itself and thus misconceives its meaning. Its central provision is Section 369-a, authorizing the execution of contracts fixing minimum resale prices. Section 369-b is the only one in which advertising is mentioned. This is a remedial provision which refers back to prices "stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a" (Pet. 26). By elementary principles the prices to be charged on sales made in other jurisdictions are not "stipulated" in a price-fixing contract authorized by New York law, as petitioner recognizes by its own disclaimer, set out above. As Judge Clark noted (Pet. 35-36), this construction, correlating the advertising, offering and selling references in the New York statute, finds support in the cases construing the identical Maryland Fair Trade Act. *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co., supra*, 240 F. 2d 684, 687-688 (4th Cir. 1957); *Revere Camera Co.* v. *Masters Mail Order Co.*, 128 F. Supp. 457, 461, 462 (D. Md. 1955). Inasmuch as respondent's advertising and offers refer solely to the terms of District of Columbia sales, it follows that the New York statute does not itself purport to reach them.

Petitioner's "disjunctive" argument is also pierced by New York decisional authority, as reflected by *People ex rel. Kirkman* v. *Amringe, supra*, 266 N.Y. 277, 194 N.E. 754 (1935). The question there concerned the scope of a New York statute broadly prohibiting any participation in the transaction of busi-

ness by a foreign insurance corporation which had not qualified to do business in New York. In rejecting its application to New York residents, who had locally serviced a policy issued by a non-qualified District of Columbia insurer, the Court ruled that the statute "does not cover aid extended *here* to an insurance company in the lawful transaction of its business elsewhere" (266 N.Y. at 281, 194 N.E. at 755; emphasis supplied).[6] There is no basis for according the Feld-Crawford Act a longer reach by extending it to cover advertising related to sales which are lawful where made.

5. Petitioner's "Conflicts of Law" and "Economic Facts" Arguments Are Inapposite.

There is no merit in the claim that the court below erroneously failed to apply the conflicts of law principles applicable to tort actions. This is only a restatement of petitioner's argument, since it assumes the conclusion that respondent's interstate activities constituted a "wrong" in New York. This conclusion is not only foreclosed by the McGuire Act, but is also incompatible with the New York statute itself. Judge Clark ruled that the Feld-Crawford Act did not cover the transactions in issue (Pet. 37) and the identical

[6] It is not material that the statute there construed was penal and therefore subject to the doctrine of strict construction. The same is true of fair trade acts, as statutes in derogation of the common law. *United States* v. *McKesson and Robbins, Inc.*, 351 U.S. 305, 316 (1956); *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, 188-189, 190 (1936); *Venable* v. *J. Engel & Co.*, 193 Md. 544, 549, 69 A. 2d 493, 495 (Ct. of App. 1949); *Pazen* v. *Silver Rod Stores, Inc.*, 130 N.J. Eq. 407, 413, 22 A. 2d 237, 240 (1941); *General Electric Co.* v. *R.H. Macy & Co.*, 199 Misc. 87, 95-96, 103 N.Y.S. 2d 440, 449 (Sup. Ct. 1951), appeal dismissed 278 App. Div. 939, 105 N.Y.S. 2d 1003 (1st Dep't. 1951).

Maryland statute was likewise held inapplicable to this respondent's mail order business in *Bissell Carpet Sweeper Co.* v. *Masters Mail Order Co.*, *supra*, 240 F. 2d 684 (4th Cir. 1957). On that ground—i.e., the lack of coverage under state law—the trial court in the latter case rejected this same "conflicts" argument. See 140 F. Supp. 165, 179-180 n. 45.

The various authorities invoked by petitioner on the conflicts point are not helpful. They are concerned either with wholly different federal statutes, or with the permissible constitutional scope of state statutes in the absence of an overriding federal enactment, or with the application of conflicts of law principles in the absence of any applicable legislation whatever, state or federal. None has any bearing here.[7]

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) hardly supports petitioner's plea in this case. The Court there condemned, on due process grounds, the effort of the State of Maryland to exert extraterritorial force in the application of its taxing statute, in

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[7] The only cited precedent even remotely related to the issue at hand is *State* v. *Davis*, 77 W. Va. 271, 87 S.E. 262 (1915). But that case is readily distinguishable. The federal statute there involved was the Webb-Kenyon Act. That was a federal contraband statute, prohibiting the "shipment or transportation [of liquor] into any other State" in violation of its laws. 37 Stat. 699; see note following 27 U.S.C.A. § 1. The McGuire Act contains no such contraband provision. It is more akin to the earlier Wilson Act in the liquor field. This allowed a prohibition state to control out-of-state liquor "upon arrival . . . in the same manner as though . . . produced in such State." 26 Stat. 313; see note following 27 U.S.C.A. § 1. Under that grant of authority the states were powerless to interfere with deliveries of liquor to local residents, whether made pursuant to C.O.D. or prepaid orders. *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438 (1898); *Adams Express Co.* v. *Kentucky*, 206 U.S. 129 (1907).

circumstances strikingly similar to those at bar. The holding there repudiates plaintiff's position, since it is familiar and long established doctrine that the reach of state power is broadest in the tax field, as indeed that case expressly recognized. See 347 U.S. at 342; cf. *New York, L.E. & W.R. Co.* v. *Pennsylvania*, 153 U.S. 628, 646 (1894).

6. Conclusion

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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